88-216

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JANE ANDRE, Petitioner,

v.

THE BENDIX CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

May a court of appeals, in reviewing a district court decision after a new trial of the same cause of action, rely upon facts determined in the first trial and reviewed in the first appeal as a basis for its determination that the second district court decision was not clearly erroneous?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Jane Andre, and the Respondent, The Bendix Corporation. The parties before the Court are the same.

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The Petitioner, Jane Andre, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on March 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit ordering a new trial is reported at 774 F.2d 786

("Andre I") and is reprinted in the appendix hereto, p.1a, infra.

The unpublished opinion of the United States District Court for the Northern District of Indiana is reprinted in the appendix hereto, p.1b, infra.

The second opinion of the Court of Appeals for the Seventh Circuit is reported at 841 F.2d 172 and is reprinted in the appendix hereto, p. 1c, infra.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered March 2, 1988 affirming the judgment of the District Court for the Northern District of Indiana. On May 23, 1988 Justice Stevens signed an order extending

the time for filing this petition for certiorari to and including July 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Petitioner filed suit in 1982 in the District Court for the Northern District of Indiana alleging that Respondent terminated her because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e)(2). After a two-day bench trial, the District Court held that Respondent had discriminated against Petitioner in violation of Title VII, awarded Petitioner $186,092 in lost wages, and ordered that she be reinstated. Andre v. Bendix Corp., 584 F.Supp. 1485 (N.D. Ind. 1984). Respon

dent appealed and the Court of Appeals for the Seventh Circuit found the findings of the District Court to be inadequate for meaningful appellate review. Therefore, the judgment was vacated and the case remanded for a new trial before a different judge. (App. A, infra, 29a).

At the second trial, Petitioner showed that she was hired by Respondent in August of 1978 after she sent a resume to Respondent. In addition to her educational background, Petitioner was interviewed and hired because she is a woman.

Petitioner was hired as general supervisor of Department 125. She had supervisory responsibility over seventy hourly employees and four salaried em

ployees. Functionally, Ms. Andre was a general supervisor, but her higher salary grade was that of a superintendent. All other general supervisors were male.

Petitioner had no desk at which to work when she began; indeed, "Bud" Tyler, who was training her, told her not to use the first desk she tried to use, and directed her to sit at a straight chair next to his desk. Petitioner used the top of a book case as a desk. All other male general supervisors were assigned desks to work at during their shifts. Petitioner did not acquire a desk until late December, 1978.

Dale Franz was Petitioner's immediate supervisor. Mr. Franz had been

employed with Bendix since 1948. He had not interviewed Petitioner, but was aware of her educational credentials before she started. Bendix's organization was changing when Ms. Andre began work. On October 1, 1978, Mr. Franz took responsibility for all general supervisors on all shifts. Petitioner was the only female supervisor reporting to Mr. Franz.

On September 27, 1978, union representatives complained about the use of non-bargaining unit personnel to operate a "hot up set" machine. The grievance was submitted to supervisor Paul Luzney, who referred the matter to the superintendent, Bud Tyler. Mr. Tyler was the department's superintendent on that date; Petitioner became superintendent

on October 1. Mr. Tyler and Petitioner went to Mr. Franz at Mr. Tyler's suggestion and asked how he wanted them to handle the grievance. Mr. Franz told them to give the grievance to the Industrial Relations Department. Petitioner said that she thought that if she could give the union steward a promise as to the date on which the "up set" machine would be installed in a production area, where union personnel would operate it, the grievance could be settled. Mr. Franz agreed that knowledge of that date would be helpful.

Mr. Franz later disagreed with Petitioner's efforts to resolve the dispute rather than simply forwarding the grievance to the Industrial Relations Department. He wrote a memorandum to the Director of Employee Relations

for Petitioner's file. Mr. Franz did not write a similar memo for Bud Tyler, the superintendent in charge at the time and who encouraged Petitioner to participate in handling the grievance.

In January, 1979, Mr. Franz wrote a memorandum to be placed in Petitioner's file concerning a union walkout. Mr. Franz referred to an "inflammatory relationship between Petitioner and the hourly." Mr. Franz testified that he believed that "the inflammatory relationship" may have arisen because the hourly employees, who had never been confronted by a female supervisor, were "testing" Petitioner.

On March 2, 1979, Petitioner met with Mr. Ted Moore, Director of Operations, who told her that because of the

way her peers and subordinates viewed her, she should change her image to more of a "team player" instead of seeming "obstinate and all-knowing." Petitioner testified that Mr. Moore told her that she would be better off if she "played dumb." Mr. Moore testified that he could not recall telling a "male" supervisor to change his or her image on any other occasion. At Mr. Moore's suggestion, Petitioner attended sensitivity training; Mr. Moore never suggested that a male supervisor attend sensitivity training.

On March 6, 1979, Mr. Franz completed, and sent to the Director of Employee Relations, a critical appraisal of Petitioner. Mr. Franz stated that Petitioner was not performing satisfac-

torily; that she had not demonstrated the relevant technical ability; that she was unable effectively to manage and communicate. He further stated that Petitioner's salary was "out of line with her performance and level of responsibility." He described her as "incorrigible" and stated that he did not wish to retain her as a permanent member of his department. Neither Mr. Franz nor the Director of Employee Relations reviewed the appraisal with Petitioner.

When measured by her Management by Objective ("MBO") goals, Petitioner's work performance was positive. Mr. Franz testified that at least 70 percent of the evaluation of general supervisors would be attributable to achieving MBO objectives. Under Petitioner's super-

vision, Department 125 exceeded production goals by 3.8%, achieving the highest production of any of the departments in Manufacturing. In addition Department 125 had lower losses, errors and defects (LED) than its budgeted goal, a fact that Mr. Franz acknowledged having received and approved.

Petitioner's responsibility was to supervise a non-air conditioned shop area. While Mr. Franz worked in an air conditioned office, the temperature in some parts of the production area would reach 104 degrees. Petitioner testified that "tank tops" were typically worn in Department 125 in hot weather. Mr. Franz confirmed that he had seen employees in Department 125 wear tank tops, even though he considered them

inappropriate.

It was hot and humid on July 12, 1979, and Petitioner wore to work an elasticized terrycloth top with rope straps. Mr. Franz received a comment from two hourly employees about Petitioner's top. Petitioner had just purchased the top because her summer clothes had not yet been sent to South Bend from Idaho. She had worn sleeveless blouses before the summer period. Mr. Franz believed that Bendix had an unposted "understanding" that one's upper body dress would extend to the shoulders. Mr. Franz called Petitioner into his office, told her that her top "did not conform to the dress code," and told her to go home and change. The posted dress code was silent on tops.

Petitioner went home and changed.

On July 13, 1979, Petitioner reported to work wearing a top similar to the one she had changed into the previous afternoon. Again, Mr. Franz called her to his office and told her to go home and change. Petitioner, while not refusing to change, asked Mr. Franz to put in writing what dress would be acceptable, but Mr. Franz refused.

Mr. Franz raised a safety concern and Petitioner stated that she wanted to see the safety officer. He did not forbid her to go to the safety engineer and he did not accuse Petitioner of insubordination.

Petitioner called the safety engineer, Dick Wyatt, and asked him to come over to look at how she was

dressed. Mr. Wyatt did view Petitioner's attire, and she testified that Mr. Wyatt told her there was nothing wrong with the way she was dressed.

After lunch, Mr. Franz saw Petitioner wearing the same top. He asked her to go to his office and wait. On the way to his office, he stopped at the guard station and asked for the captain of the guard to go to his office to witness Petitioner's discharge. Petitioner testified that two armed guards appeared at Franz's office. Mr. Franz had never before asked a guard to witness a discharge. The Director of Employee Relations viewed the use of the guards as unnecessary.

At his office, Mr. Franz informed Petitioner that she was being discharged

for insubordination. Mr. Franz asked for her badge, and Petitioner asked to speak to the General Manager first. Petitioner turned over her badge, and two guards escorted her out of the plant in full view of other employees.

On July 13th, after Petitioner's termination, a decision was made to change the termination to a suspension. Petitioner was not informed of that decision at the time.

A separation committee was formed to review the suspension. Mr. Moore could not recall such a committee being called on any occasion in which a man had been discharged. The Director of Employee Relations could not recall a separation committee being formed in other than reduction-in-force situations.

Petitioner was not asked and did not appear before the separation committee, which considered Petitioner's file and her written rebuttal. The committee decided to terminate Petitioner "due to inability to perform the duties of her position." The committee's written decision said nothing about insubordination as a ground for termination; neither did a July 20th letter formally informing Petitioner of the committee's decision.

The District Court held that Petitioner did not show, by a preponderance of the evidence, either that respondent's stated reasons for Petitioner's termination were pretextual or that Respondent's treatment and discharge of Petitioner were based on her sex. The

District Court's judgment was entered November 10, 1986. On November 20, 1986 Petitioner filed a timely Motion to Amend or Alter the Judgment. Petitioner asserted in that motion that the court disregarded or failed to consider important evidence demonstrating discriminatory intent and pretext by Respondent. The motion was denied on January 21, 1987. On February 20, 1987, Petitioner filed a timely Notice of Appeal from the judgment and the denial of her Motion to Amend or Alter the Judgment.

Petitioner's appeal presented three questions for review:

1. Whether, after resolving all significant credibility conflicts in favor of Petitioner, the court erred in not finding Respondent's reasons for its

actions were pretextual and based on discriminatory intent?[1]

2. Whether the court's failure to weigh certain important evidence and failure to consider the cumulative

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[1] The District Court found the testimony of Petitioner's immediate supervisor and Respondent's key witness palpably evasive. (App. B, infra, 74b). In addition, the District Court believed the testimony of Petitioner instead of the testimony of Respondent's other witnesses such as the safety engineer. (App. B, infra, 47b).

effect of the evidence as a whole was clearly erroneous?[2]

3. Whether the court erred by assuming that it was only Petitioner's "subjective belief" or "self-interested assertions" that formed the basis of her claim of disparate and discriminatory treatment because of her sex?

The Court of Appeals for the Seventh

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[2] One of the pieces of evidence not even mentioned in the District Court opinion is the testimony by Petitioner's supervisor, Dale Franz, that he had only fired one woman in his career (Petitioner) and that he had to fire a male supervisor who had been caught slashing tires in the employee parking lot. While Petitioner was escorted from the plant by uniformed guards for a dress code violation, the male tire slasher was fired without the assistance of uniformed guards. See Transcript pp. 117-118. This evidence was not part of the record in the first trial.

Circuit affirmed the District Court judgment, holding that the District Court was correct in finding that Petitioner "failed to meet her burden of demonstrating by a preponderance of the evidence either that (Respondent's) preferred explanation for her discharge was pretextual or that her treatment and discharge were based on her sex." (App. C, infra, 9c). In addition, the court held:

> "In light of our opinion in Andre I, we cannot say that the district court's finding that Bendix did not intentionally discriminate against Andre was clearly erroneous." (App. C, infra, 10c) (emphasis added).)

REASONS FOR GRANTING THE PETITION

The court of appeals' reliance on facts determined by the district court

and court of appeals in Andre I is a serious error in light of this Court's longstanding holdings with regard to the effect of an order for a new trial:

> But it is quite clear, that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause.

United States v. Ayres, 76 U.S. 608, 610, 19 L.Ed. 625 (1870); see also Insurance Co. v. Dunn, 86 U.S. 214, 22 L.Ed. 68 (1874).

In Andre I the court of appeals vacated the judgment and remanded the case for a new trial before a new judge (App. A, infra, 29a). Petitioner approached the new trial as if the first trial had not taken place, but mindful of the legal reasoning by the court of

appeals as it analyzed the original opinion by the district court.

Petitioner presented significant new evidence in the second trial, specifically the information about the discharged male tire slasher discussed in this petition supra at p. 19, n.2 and substantial new testimony regarding Petitioner's performance in light of productivity goals set by Respondent. See Tr. 119-132. Nevertheless, the second court of appeals opinion repeatedly refers to factual findings in Andre I to support its affirmance of the judgment in favor of respondent in the second trial.

The following examples illustrate the misplaced reliance by the court of appeals on Andre I:

1. "Only a brief factual examination is necessary because both

district court opinions and this court's opinion in Andre I set forth an exhaustive review of the facts." App. C., infra, 3c.

2. "In Andre I, however, we held that Bendix's more favorable treatment of Andre during the application/hiring phase could not form the basis of a finding of intentional sex discrimination resulting from her eventual discharge." Id. at n.1.

3. "During the course of Andre's employment wih Bendix, a number of incidents occurred in Andre's department which Franz felt she handled improperly. See Andre I...." Id. at 4c.

4. "We concluded in Andre I that these memoranda could not 'raise or corroborate an inference of bias against Andre' because Franz filed similar memoranda in all of his employees' personnel files." Id. at n.3.

5. "In Andre I we determined that the safety reasons Franz proffered might well have been a pretext." Id. at 5c, n.4.

6. "It is undisputed that Franz had never used a guard to escort any other discharged employee from the plant. In fact, when Franz discharged a male employee who had been caught slashing tires in the parking lot, he did not ask a guard to escort him from the building. In Andre I, however, we held that although the use of a uniformed guard 'seems bizarre, there is really nothing about it to support an inference that a similarly situated male would have been treated differently.'" Id. at n.5.

7. "In Andre I we held that '[t]here was plenty of evidence in the record before the committee to support its determination. Clearly, the reason given was not an after the fact pretext to cover up its own sex discrimination.'" Id. at 6c, n.6.

8. "There are at least two plausible views of the evidence in this case. In light of our opinion in Andre I, we cannot say that the district court's finding that Bendix did not intentionally discriminate against Andre was clearly erro-

neous." Id. at 10c.

The court of appeals approached this case as if the evidence, including testimony and exhibits, was presented at the new trial in exactly the same manner. A comparison of the record in both trials would demonstrate that significant differences existed in the order of proof and use of documentary and testimonial evidence. For example, there was extensive testimony by Bud Tyler, Petitioner's predecessor and one of several supervisors, concerning petitioner's performance in light of the Management by Objective program, as illustrated by Plaintiff's Exhibit 43. Neither Mr. Tyler nor Exhibit 43 were part of the first trial.

In addition, the example of the

tire slasher cited supra, p.24, suggests that the court of appeals may have assumed that evidence was a part of the record in the first trial. It was not.

As to the extent to which the district court in the new trial was bound by the outcome of Andre I, the court of appeals in Andre I stated:

> . . .this case is much like Mozee v. Jeffboat, Inc., where we remanded for a new trial, even though the district court here did not ignore whole categories of evidence.

App. A., infra, 28a. In Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984) the court explained the constraints, if any, to be placed on the district court in conducting a new trial:

> Further, the district court should, in general, not feel

> bound by the law of the case doctrine or some like constraint to adhere to the modes of analysis or procedures pursued at the first trial unless it is persuaded of their correctness.

746 F.2d at 375.

The district court at the new trial was presented with a situation that placed the parties before the court as if the first trial had never taken place. United States v. Ayres and Insurance Co. v. Dunn, supra, p. 21. The court of appeals' reliance on facts and evidence from Andre I is inappropriate and requires correction by this Court.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2296

JANE ANDRE,

Plaintiff-Appellee,

v.

THE BENDIX CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Indiana, South Bend Division.
No. 82 C 77—**Allen Sharp**, *Judge.*

ARGUED APRIL 23, 1985—DECIDED OCTOBER 3, 1985

Before CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge*, and TIMBERS, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* Plaintiff Jane Andre was hired by defendant The Bendix Corporation for a supervisory position in its Energy Controls Division in South Bend, Indiana, at least in part on the basis of her sex. She was fired within a year, and brought this Title VII action alleging that the termination was also on the basis of her sex. After a bench trial, the district court found that Andre had been fired on account of her sex, and awarded her $186,092 in lost wages as well as ordering that she be reinstated. 584 F. Supp. 1485 (N.D. Ind. 1984). Bendix appeals, raising two issues: first, that the evidence was

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, is sitting by designation.

insufficient to support a finding of intentional sex discrimination, and second, that the district court violated Rule 52(a) of the Federal Rules of Civil Procedure by adopting, virtually verbatim, Andre's post-trial brief as its decision. This is a hard case. If we were sitting as triers of fact, we would certainly have difficulty finding that Andre had been discriminated against on account of her sex. However, the different question now before us is whether the finding of the district court that there was discrimination is clearly erroneous. In that respect, because we are unable to follow the reasoning of the district court, and are unable to affirm the district court finding of sex discrimination on the grounds it gives, we vacate the judgment of the district court and remand for a new trial.

I.

In the early part of 1978 Andre sent her resume to a very large number of manufacturing corporations, including Bendix. At Bendix, her resume was eventually routed from F.G. Cousins, who was responsible for recruiting, to A.E. Clark, Vice President and Group Executive of the Aerospace Group, with a notation "Any interest in a senior level female?" Pl. Ex. 18. Clark called Ted Moore, Director of Operations for the Energy Control Division, and described Andre's qualifications, apparently in gender-neutral terms. Moore responded "I'd like to meet that man," and was corrected by Clark. Moore continued to show interest, and Andre was invited to South Bend for interviews twice.

After his interview with Andre, Moore wrote a memo to his immediate superior, Alex Stefucza, General Manager of the Energy Controls Division, with a copy to Jeanne Rideout, Director of Employee Relations at the Energy Controls Division, concerning his impressions. Pl. Ex. 23. He found Andre's academic background and technical understanding impressive. However her work experience was exclusively in staff or support positions. He felt she lacked experience supervising a large number

of employees or managing a production line. He also felt he observed a defensiveness in Andre in her attribution of the rejection of her proposals in prior employment to her sex and not to the merit of the proposals. Moore proposed, however, that Andre be hired at the Superintendent level where she would get manufacturing supervisory experience and her supervisory abilities could be evaluated. If those were found adequate she could be promoted within 18-24 months to a managerial position in manufacturing. However, Moore conceded that there was some risk to his proposal. In an apparent reference to what could be described as the large number and short tenure of the jobs in Andre's employment history, he found there was no evidence in the record that she had the "necessary emotional st bility" to work as a supervisor.

Eventually an offer of two jobs was extended to Andre. She accepted the position of Superintendent in the Manufacturing area of the Energy Controls Division. Pl. Ex. 1. She was offered a salary of $2920 per month, and told that the maximum in the grade level was $3110 per month, and in the next logical progression was $3775 per month. Consistent with Moore's proposal, Andre understood that the offered position was in part a trial for 4-6 months before she would be considered for a manufacturing managerial position. She understood that the salary she would be receiving was very high for a superintendent's position but also that some increase could be available if she moved to a managerial position. She also understood that the position was "up or out," for there would be "no place else to go" if things did not work out. Finally, and probably most important, it was clear to Andre that the division had been undergoing reorganization. The various local players were trying to create two manufacturing managerial positions, one of which (at the "Director" level) was intended for Dale Franz, who at that time was Manager of Manufacturing Services, and the other of which (at the "Manager" level) would be open for Andre, but the national headquarters had not yet approved the reorganization. Andre further understood

that should she move up to a managerial position it could be resented by longtime employees, especially those who would also be candidates for the position. *See* Pl. Ex. 15, pp. 1-2.

Andre started working at Bendix on September 18, 1978. When she arrived a reorganization had been temporarily completed, but without the creation of a second managerial position in manufacturing. Dale Franz had been laterally transferred to the single Manufacturing Manager position.[1] Andre was placed as a "General Supervisor," apparently functionally equivalent to a superintendent. She was subordinate to Franz. She was told there would be another reorganization in about 9 months, and she would have a chance to prove herself as a supervisor until that time.

During Andre's tenure she was involved in a number of incidents in the factory. These events included a dispute over the proper handling of a union grievance only two weeks after Andre started work; a dispute in January 1979 over the issuing of a pass to an hourly worker who wished to be excused from weekend overtime work; a dispute over a reprimand to one of the shift supervisors reporting to Andre, also in January; disputes in February over the proper handling of a phone call to a hourly production worker and over whether an injured worker

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[1] At the time Andre interviewed with Bendix, Don Notary held the position of Manufacturing Manager. Franz at that time held the position of Manager of Manufacturing Services, a position at the same level as, but covering a different area than Notary's position. Notary managed production while Franz managed the technical and engineering staff which assisted production workers in solving various problems. When Andre started with Bendix in September, Notary was still Manager of Manufacturing, but Franz had already been asked to take the position of Manager of Manufacturing, and did so before October 1, 1978. Pl. Ex. 19; *see* 584 F. Supp. at 1488 n.3.

Neither Notary nor Franz interviewed Andre. Franz had no part in interviewing or hiring Andre. 584 F. Supp. at 1488 n.3.

was able to operate his usual machine; and disputes over proper methods for running and evaluating procedures in Department 125, the department supervised by Andre. After each of these incidents, and at other times, Franz wrote memoranda to Andre's file detailing what he found inadequate or inappropriate in her handling of the situations. Bendix claims these and other incidents show Andre was unable to function as a supervisor. She claims they show Bendix was out to get her because of her sex. We think they show some sort of conflict between Franz and Andre.[2]

In January 1979 Franz met with Andre to discuss performance and productivity in Department 125. He may have told Andre that the department was meeting its goals. In early February Andre was given a hand-printed report of the department's productivity. Def. Ex. A. The report showed that the objectives set for increasing productivity had been met, but that production output was slightly below the objective at that point. Franz apparently felt that output could be caught up quickly, and requested Andre to convey the results to each of her production supervisors.

Moore met with Andre on March 2, 1979. He spoke in general language to the effect that she had a "people problem" and that he was getting negative feedback from people in the department, but would not elaborate. He showed Andre a memo she had written to a production supervisor subordinate to her, and said it showed a lack of sensitivity. The memo had been written without a full knowledge of the relevant facts (as Andre now admits) and accused the supervisor of "needing a shot of male hormones." Pl. Ex. 5, p. 2. Andre said that the memo

[2] The district court adopted much of Andre's versions of the these events in its statement of facts, §§ F-J, 584 F. Supp. at 1492-96, but only relied on some of them in its analysis supporting its finding of sex discrimination, 584 F. Supp. at 1505-07. We discuss the district court's analysis, including the events it relied on, in Part III A of this opinion.

showed she was angry, not insensitive, but acceded to Moore's suggestion that she attend a sensitivity training workshop, which she did (at Bendix's expense) in May. Moore also suggested that Andre try to change her image, perhaps by rolling back the production figures or "playing dumb."

Franz completed a three-month evaluation of Andre on March 6, 1979, almost six months after she had started work. Pl. Ex. 8. The report was negative. It stated that she had not demonstrated technical abilities related to the Department 125 processes, that her salary was out of line with her performance and level of responsibility, and that she was incorrigible. Franz did not show the report to Andre or allow her to respond, but sent the report to her file.

Moore wrote a memorandum about Andre to Rideout on March 12, 1979, recording various criticisms of her performance. Pl. Ex. 9. Moore used the memorandum as a cover to transmit to Andre the several memoranda Franz had written and placed in her file. Moore gave Andre the memoranda at a meeting between them on March 21, 1979. Moore said he did not want to hear Andre's side of the story, but told her she had the right to file written rebuttals, though apparently in a tone of voice Andre claims led her to believe that she would be fired if she did prepare rebuttals.

Andre did prepare a memorandum in response to the meeting. Pl. Ex. 10. The memorandum was addressed to Moore, with both Franz and Rideout receiving copies. In her memorandum Andre recognized the difficulty "in trying to acclimate a female from a predominately development environment to one of production," and that she had been "working hard since last week's meeting to improve the situation with respect to acceptance of myself by my peers, subordinates, the union representatives, and the hourly personnel." She thought that if she succeeded in doing that, her acceptance by Moore and Franz would improve. She said she had looked at herself in the mirror

and objectively made "a critical analysis in an effort to draw conclusions and then make recommendations to myself about ways in which I can improve and grow professionally in my experience with Bendix."

The memorandum also explained that Andre would not at that time submit a detailed rebuttal to the memoranda in her file. Instead, she would type up a rebuttal which she would hold onto "unless it absolutely becomes necessary to defend myself." She also proposed a deal to Moore: "If I manage to improve my image in your and Mr. Franz's eyes by my first year's anniversary (or any other date you wish to set), will you be good enough to discard all of those memos you put in my personnel file?"

Moore responded with another memorandum. Pl. Ex. 11. This memorandum reiterated that he and Franz were seriously concerned about Andre's supervisory ability "both from the technical aspects and the human relations aspects of the job," and that Andre had a right to dispute the data in the file and to rebut it. The memorandum also stated that the company had arranged to send Andre to "developmental training in the human skills which seem to be lacking." Finally Moore stated he was unable to go along with Andre's request to remove material from her file if her performance improved. He did agree to "add material to the file showing improved performance if, indeed, this occurs. This subsequent inf[illegible]ation would show the necessary improvement and override the previous information which has been placed in the file."

On July 12, 1979, Andre wore a tank top with double one quarter inch rope shoulder straps to work. Franz told her it was unacceptable because it violated the dress code, and sent her home to change. She went home and changed into a tank top with a round neckline and cloth straps over the shoulders. Neither Franz nor Andre saw the other the rest of that day. The following day Andre wore a tank top with a round neckline and spaghetti straps over the shoulders. Franz called Andre into his office, and an argument ensued. Andre's basic position was that the top did not violate the dress code because

hourly workers were allowed to wear such clothes. Franz claimed the top violated the dress code because supervisors were supposed to wear short sleeved shirts with collars, and that the top was unsafe. He ordered her to change. Andre left to get the opinion of Dick Wyatt, the Manager of Health and Safety. She says she would have changed if the safety manager said there was a problem, but he did not.[3] Later that day Franz called Andre, who was still wearing the same top, back to his office and fired her for insubordination. He had two security guards march her out of the factory.

The Bendix personnel department changed the summary termination to a suspension and convened a review committee. The committee received a twenty-one page memorandum from Andre in rebuttal to the memoranda in her personnel file, Pl. Ex. 15, but upheld the discharge on grounds of "inabilities to perform the duties of your position." Pl. Ex. 16.

On August 14, 1979, Andre filed timely charges of sex discrimination with the Equal Employment Opportunity Commission (the "EEOC") (charge number 053791964), App. 131, and the South Bend Human Rights Commission (the "SBHRC") (charge number 79-63), App. 129. After submission of extensive documentation by Andre, a fact-finding conference and a full investigation by the SBHRC staff, the SBHRC concluded that there was insufficient evidence to find probable cause that discrimination had occurred. App. 132-40.[4] Andre appealed this ruling to the full SBHRC which, after a hearing, found that Andre had presented no evidence that she was discharged because of

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[3] Wyatt's testimony tends to support Franz's version of the incident. The district court was obviously aware of the conflict in testimony, *see* 584 F. Supp. at 1499 & n.13., but did not explicitly resolve it, and did not rely on what Wyatt may or may not have said in its analysis supporting its finding of sex discrimination, *see id.* at 1506-07.

[4] Indeed, the SBHRC concluded that Andre's documentation verified Bendix's stated reasons for her discharge. App. 139.

her sex or treated differently because of her sex, and affirmed the earlier findings. App. 142-45. Shortly thereafter the EEOC concluded that there was no reasonable cause to believe that Andre's charge of sex discrimination was true, and issued its notice of right to sue. App. 146. The EEOC gave substantial weight to the findings of the SBHRC.

Andre commenced this litigation with a timely complaint in the District Court of the Northern District of Indiana, South Bend Division. A bench trial was held on February 27 and 28, 1984. *Cf.* 584 F. Supp. at 1486 (erroneously stating trial held Feb. 28 & 29). At the close of the day and a half trial the district court ordered both parties to submit proposed findings of fact and conclusions of law. The court also ordered Andre's counsel to submit a petition for attorney's fees.

On May 11, 1984, the district court issued its Memorandum and Order. 584 F. Supp. 1485. This was four days after Bendix submitted its post-trial brief and proposed findings of fact and conclusions of law, which totaled some 44 pages, and 28 days after Andre submitted her post-trial brief with its proposed findings of fact and conclusions of law. The district court's order essentially adopted—"photocopied" would more accurately describe the process—Andre's post-trial brief, though numerous changes were made. The district court ruled that Bendix had unlawfully discharged Andre because of her sex, and awarded $186,092 in back pay as well as reinstatement. In a separate order of the same date the court awarded $28,000 in attorney's fees and $3,389.49 in costs. App. 57-61. Judgment was entered and Bendix perfected a timely appeal. As noted, the two issues on appeal are whether the district court's finding that Andre was discharged on account of her sex is clearly erroneous, and whether the district court's wholesale adoption of Andre's proposed findings of fact and conclusions of law as its own violated Rule 52(a) of the Federal Rules of Civil Procedure.

II.

There can be little dispute in this case over the proper burden of proof below or standard of review in this court. The burden of proving that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The rules governing the burdens of production and order of proof in a Title VII case alleging discriminatory treatment are more complex, though not difficult to understand. The plaintiff begins her case with the burden of making out by a preponderance of the evidence a prima facie case of discrimination. *Burdine*, 450 U.S. at 252-53. After the plaintiff has established a prima facie case, the burden is on the defendant to produce evidence of a "legitimate, nondiscriminatory reason for the employee's" termination. *Burdine*, 450 U.S. at 253. This is not a burden of persuasion but rather a burden of production. If the defendant's evidence raises a genuine issue of fact, the presumption created by the plaintiff's prima facie showing drops from the case. *Burdine*, 450 U.S. at 254-55. The plaintiff then has the opportunity to show that the alleged reason was pretextual. The burden of showing this merges with the ultimate burden of showing that the defendant intentionally discriminated against the plaintiff. *Burdine*, 450 U.S. at 256. A plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* *See, generally, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 179-80 (3d Cir. 1985) (Wisdom, J.); *Coates v. Johnson & Johnson*, 756 F.2d 524, 531 (7th Cir. 1985); *Parker v. Board of School Commissioners*, 729 F.2d 524, 526 (7th Cir. 1984); *Nellis v. Brown County*, 722 F.2d 853, 856 (7th Cir. 1983); *Lee v. National Can Corp.*, 699 F.2d 932, 935-37 (7th Cir.), *cert. denied*, 464 U.S. 845 (1983).

The framework established by these rules "requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." *Aikens*, 460 U.S. at 718 (Blackmun, J. concurring). Of course, since the plaintiff at all times retains the ultimate burden of persuasion, she must present some evidence by which the finding of sex discrimination can be supported.

If a case is fully tried on the merits, and the employer produces evidence of a legitimate nondiscriminatory reason for its action, neither the district court nor the reviewing court should concentrate on the issue of whether the plaintiff has established a prima facie case. *Aikens*, 460 U.S. at 714-15.

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

Aikens, 450 U.S. at 715 (quoting *Burdine*, 450 U.S. at 253).[5] *See Suson v. Zenith Radio Corp.*, 763 F.2d 304, 307 (7th Cir. 1985); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 927 (7th Cir. 1984). Whether the defendant intentionally discriminated against the plaintiff is, of course, the ultimate factual inquiry in a Title VII case. *Aikens*, 450 U.S. at 715; *Burdine*, 450 U.S. at 253; *Parker v. Board of School Commissioners*, 729 F.2d at 526. The court must consider the defendant's evidence that the action

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[5] It is for this reason that Bendix's argument that Andre failed to establish a prima facie case of intentional sex discrimination, Bendix Br. at 27-32, is beside the point. Of course, we have considered the points Bendix makes in its argument insofar as they support its relevant argument that the district court's finding of sex discrimination is clearly erroneous.

was motivated by a legitimate nondiscriminatory reason and the plaintiff's evidence that that reason is a pretext, and "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716. The plaintiff, of course, bears the burden of persuasion. *Aikens*, 460 U.S. at 716; *Burdine*, 450 U.S. at 256.

In reviewing a Title VII discrimination case, the general rule is that the court of appeals is bound by Rule 52 of the Federal Rules of Civil Procedure to accept the district court's findings of fact unless they are clearly erroneous. *Parker v. Board of School Commissioners*, 729 F.2d at 527; *Nellis v. Brown County*, 722 F.2d at 859. This includes the ultimate factual issue in a Title VII case, the finding of intentional discrimination. *Anderson v. City of Bessemer City*, 470 U.S. ____, 105 S. Ct. 1504, 1511 (1985).[6] Of course, the district court's findings must themselves be sufficient to satisfy the requirements of Rule 52. *See Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 370 (7th Cir. 1984); *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1183-84 (7th Cir. 1982); *Denofre v. Transportation Insurance Rating Bureau*, 532 F.2d 43, 45 (7th Cir. 1976) (per curiam).

In *Anderson* the Supreme Court considered a case where the court of appeals had failed to give proper deference to the district court's finding of discrimination. The Court went to some lengths to explain the meaning of the clearly erroneous standard.

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these

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[6] Bendix argues that because the district court adopted substantial portions of Andre's post-trial brief in its decision, its findings should be given a "more critical" reading on appeal. Andre agrees that this is appropriate. Andre Br. at 39, 49-50. We have done so, though we are still bound by the clearly erroneous standard. *Coates v. Johnson & Johnson*, 756 F.2d 524, 533 n.7 (7th Cir. 1985).

principles . . . is that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. . . .

. . . .

When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness.

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. City of Bessemer City, 470 U.S. at ____, 105 S. Ct. at 1511-13 (citations omitted).

With these principles in mind, we now turn to an examination of the district court's finding that Andre was fired because of her sex.

III.

Bendix challenges a number of the factual findings upon which the district court predicated its ultimate finding of sex discrimination. We will consider these in turn.

A.

1. The district court found that Cousins did not treat Andre "as a job applicant like any other." 584 F. Supp. at 1505. Bendix concedes that this is true, but claims this cannot support a finding of sex discrimination. We agree. Andre was treated more favorably in the hiring process because of her sex. For instance, she was offered a salary $720-1075 more than the other second level supervisors, and was told she would be under consideration for advancement to a managerial position after 4-6 months. On the other hand, she was aware that the reorganization

was not then final and there were other candidates for the job. Favorable treatment is not actionable under Title VII as sex discrimination. However, the district court went on to state that the " 'era of good feelings' created during Bendix's process of acquiring Jane Andre as an employee changed upon her arrival at the scene." *Id.* Thus we do not think the district court relied on the favorable hiring treatment in finding sex discrimination.

2. The district court found that Franz, Andre's competitor, was placed in the position of Manager of Manufacturing. 584 F. Supp. at 1505. Franz was selected for this position, but before Andre started work at Bendix, and Andre had been told during her interviews that Franz was also competing for a managerial position in manufacturing. Further, she had been told that the reorganization had not been approved by Bendix's corporate headquarters. We fail to see how the lateral transfer of Franz could support a finding of sex discrimination. It might, however, support an inference that Franz was aware that Andre was going to be considered for his position and had a motivation to try to prevent her from getting it.

3. Bendix challenges the district court's finding that the "network of Moore, Franz, Rideout, Luzney, Loutzenheiser and others appears to have been created over approximately 30 years at Bendix." 584 F. Supp. at 1505. We are uncertain what to make of this finding. Clearly, the named individuals had been at Bendix for a long time, and had worked together. But insofar as this is meant as a finding that there was some sort of conspiracy to get rid of Andre it is clearly erroneous. There is no evidence of a conspiracy or network. Further, the district court's finding that there appeared to have been "an effort, calculated or not, to reduce Jane Andre's ability to deal effectively with those reporting to her," 584 F. Supp. at 1506, could not support a finding of intentional sex discrimination because the court never found this effort to have been calculated, or to have to do with Andre's sex.

4. The district court found that Andre was given a "*de facto* demotion" even before she arrived. 584 F. Supp. at 1505. Andre was hired as a "Superintendent." Before she arrived the production supervisory classifications were reorganized. In each department there were now shift supervisors, one of whom was responsible for production during each of the three shifts, and a "general supervisor." Each shift supervisor reported to the general supervisor. Andre was a general supervisor. "General supervisors" appear to be functionally equivalent to "superintendents." Indeed, Paul Strasser, who had been a superintendent also became a general supervisor. He was, of course, male. He was kept as a "superintendent" for salary purposes, but his salary was comparable to that of the other general supervisors. Andre was also kept as a superintendent for salary purposes. However, she was paid $720 per month more than Strasser. Since Andre was treated better than the similarly situated male, this "demotion," if in fact it was such, could not support a finding of sex discrimination.

5. The court found that Andre was not given a private office, desk or phone upon arrival, although she "expected" such. How the fact that the general supervisors shared an office and phones should support a finding of sex discrimination is beyond us. The district court concluded that this was "a concrete demonstration of managerial unhappiness that Jane Andre had ever come to the Energy Controls Division." 584 F. Supp. at 1505. Even if this were true, there is no indication that the unhappiness had anything to do with her sex. Further, the fact that Andre was not listed in the company phone book when she was fired does not show discrimination but only disorganization, since there was no evidence newly hired male supervisors were listed more quickly.

6. The district court found that Franz was placing memos in Andre's file and neither he nor Rideout were telling her. 584 F. Supp. at 1506. This is true, but cannot raise or corroborate an inference of bias against Andre. The testimony was uncontradicted that Franz did this on

a routine basis to all his employees. Rideout had responsibility for over 2000 employees and did not speak with each employee or even each supervisor who had a memo put in his or her file. She testified she would not have told Andre about the memos if Andre were male. However, the incidents underlying the memos Franz wrote and his handling of the incidents in the memos, might support an inference of bias, and will be discussed shortly.

7. The district court found that Andre's rebuttal memorandum of July 16, 1979, adequately responded to Franz's memos to her file. 584 F. Supp. at 1506. The court concluded that Franz's memos showed a refusal to deal with Andre as a colleague. *Id.* We agree that the two sets of memoranda show two at times sharply differing versions of the events. Franz's memos do not seem at all times to be fair. Andre's rebuttals show her to have frequently—but not always—acted aggressively against her subordinates without investigating the facts of the event. She wrote a memo to one of her supervisors accusing him of "needing a shot of male hormones" for rehiring a worker whom he had fired the day before. Pl. Ex. 5, p. 2. It turned out, however, that the Industrial Relations Department had required that the employee (a union steward) be reinstated; the supervisor had not backed down. At another point, Andre took a call for an hourly employee on the second shift. The call was from a high school teacher and concerned the employee's child. Andre determined that the call could be returned later. Somewhat misleadingly Franz's memo says Andre "questioned the emergency status" of the call, implying that the call was an emergency but that Andre would not allow the employee to take the call. Andre's message to the hourly employee shows her to have an aggressive managerial style. Franz's memo shows that he questions her action, not that he was discriminating against her because she was a woman. Pl. Ex. 6.

Another incident concerned whether Andre called an hourly employee a "fool" during a shouting match started by the employee. The employee complained to Franz, who

summoned Andre to his office and asked her if she did call the employee a fool. She denied it. Franz took the word of the hourly employee, which was supported by that of another employee, over that of Andre. He wrote a memo to Andre's file which stated that this "normally would be considered 'shop talk,' but in view of the inflamatory relationship between Ms. Andre and the hourly, I consider this action another example of unacceptable supervision on her part." Pl. Ex. 4.

Franz also wrote a memorandum to Andre's file after a dispute over whether an injured hourly worker could work his usual job. Bobby Dean was a second shift worker who usually operated a machine which required two hands. In February, he had a cast on one arm, but wanted to work. Both Franz and Moore denied his request. Dean then approached Andre, without telling her he had already seen Franz and Moore. She said she would allow him to work. Before Dean started work Franz met with Andre, mentioned Dean's approaches to him, and discussed whether Dean should work. Franz said that Dean could work only if he had a doctor's permission, and instructed Andre to send Dean to the company doctor when Dean reported for work. Pl. Ex. 15, p. 10. Dean reported with a note, apparently from another doctor, and Andre let him work without sending him to the company doctor. The next day Franz told Andre that the company doctor did not want Dean to work. Dean and Andre phoned the company doctor, who told Andre that he thought Franz did not want Dean to work and so he, the doctor, had decided Dean should not work. *See* 584 F. Supp. at 1496. At that point Andre appears to have sent Dean home. Franz then wrote a memo to Andre's file stating that Andre did not check with the company doctor and used "unacceptable poor judgment" in allowing Dean to work. Pl. Ex. 7, p. 2.

These incidents may show that Franz refused to treat Andre as a colleague, as the district court found. But Andre was Franz's subordinate. Their respective versions

of the incidents show that they differed over what happened and what was appropriate. But nothing shows this difference to be due to Franz discriminating against Andre because of her sex.

8. The district court also relied on an incident involving the handling of a union grievance in the second week of Andre's employment at Bendix. The grievance concerned whether union employees would be paid for parts produced by salaried research staff on a machine they were developing. Franz's claim is that he told her to refer the grievance to Industrial Relations but she did not do so. He wrote a memo to her file to that effect. Pl. Ex. 3. Andre claims that Franz first told her to refer the grievance but then accepted her proposal of a way to respond. She then carried out the steps of the proposed response, which was rejected by the union. She then referred the grievance to Industrial Relations, and was talking about something else with the union, which Franz mistakenly took to be a continued discussion of the grievance.

Shortly afterwards, Moore, Franz and Andre met to discuss the incident. Moore believed Andre had been asked by Franz not to answer the grievance, but she explained she had received his message too late and so could not have been insubordinate. Moore then tried to explain why it was so important to refer this type of grievance to Industrial Relations, but Andre interrupted him so repeatedly that he lost his temper and scolded her. Because of this scolding she didn't get a chance to make him understand her side of the story.

The district court apparently believed Andre's account of the handling of the grievance and Moore's account of the meeting. 584 F. Supp. at 1492-93. But the court thought that the grievance was minor and thus Moore's support of Franz for treating it as major showed that Moore treated Andre as difficult to get along with and supported a finding of sex discrimination. 584 F. Supp. at 1505. We cannot agree that Moore's handling of the dispute could be support for a finding of sex discrimination. There is no evidence union disputes in which

male supervisors were involved were evaluated differently by Moore.

9. The district court makes much of the application of the dress code to Andre. We find this emphasis erroneous. The dress code required "appropriate clothing." What clothing was appropriate is not specified. The record establishes that during the summer the hourly workers in Department 125 commonly wore tube tops, halter tops and colored u-neck undershirts (basketball type shirts). Both men and women wore these sleeveless shirts. All the male supervisors wore collared shirts with sleeves, though not with ties. Most wore sports shirts. Tr. 298. *Cf.* Tr. 224 (day shift supervisors wore white shirts and ties). The one female production supervisor who testified at trial, Nancy Bailey, stated that a sleeveless blouse would not be unacceptable so long as it had a collar and a seam of over two inches from collar to arm hole. She testified that a tube top with narrow rope straps such a Andre wore would not be appropriate for a female supervisor. Tr. 298-99, 303.

The district court found that Franz's ruling that Andre's tops were inappropriate was "based on Franz's preference that Jane Andre dress as the other male supervisors." 584 F. Supp. at 1506. That finding has support in the record. But it cannot support a finding of sex discrimination. The district court found the application to Andre discriminatory because "other women in the plant wore what she was wearing." *Id.* Andre *was* being singled out from the other women: they were hourly workers, she was a supervisor. She wanted to dress like the hourly workers, male and female; she was told to dress like the supervisors. She was a supervisor. The dress policy may have been unreasonable, given the heat in the department, but it was not discriminatory. *See Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 181 (3d Cir. 1985) (Wisdom, J.).

It is true that when Andre resisted Franz's initial directive to change the top he fell back on a safety

rationale. Andre correctly pointed out that such reasoning would apply to the hourly employees as well. (The testimony is inconclusive as to whether safety concerns would require the change in tops.) So the safety reason may be a pretext. But that does not show that asking Andre to dress appropriately (in this case like the male superviors) was motivated by sex discrimination. Nor does it show that Andre was not being insubordinate by refusing to change.

10. Franz had Andre escorted out of the plant by two uniformed security guards. This was unusual. It may well have been humiliating, and would support a finding that Franz was hostile to Andre. This incident comes the closest of anything in the record to substantial support of the district court's finding of sex discrimination. Still, although the event seems bizarre, there is really nothing about it to support an inference that a similarly situated male would have been treated differently.

11. After Andre was fired, Bendix changed the termination to a suspension. (Franz had not followed company policy for summary termination.) The company then formed a review committee of Ted Moore, the man who had hired Andre, Jeanne Rideout, the female director of personnel, and W. Kunz, Director of Electronic Operations, who knew nothing about the preceding events. The committee reviewed Andre's file and her rebuttal memorandum. It affirmed the termination.

> The consensus of the Committee was Ms. Andre did not possess the necessary people skills nor was making progress in the day to day supervision of her subordinates. She lacked good judgment in her relationship with subordinates and superiors. Her past welding experience in structural welding and circuit board soldering application was lacking on our specific application.
>
> The decision of the Committee was Ms. Andre would be terminated due to inability to perform the duties of her position.

Pl. Ex. 22. The letter to Andre notifying her of the committee's decision stated that termination was due to "inabilities to perform the duties of your position." Pl. Ex. 16. The district court disbelieved the reasons.

The committee's decision was based on the on-the-spot firing by Franz, its own experience, and a review of the memoranda in Andre's file, and her written rebuttal to those memoranda. The memos in her file were all written by Franz, with the exception of Moore's memoranda, some of which were based in part on what Franz had said to Moore. Thus the review committee in part took Franz's word over that of Andre. But Moore had interviewed Andre and dealt with her on numerous occasions during her employment at Bendix. From the beginning he had expressed doubts about her supervisory ability. There is absolutely no evidence that this scepticism was based on Andre's sex and not on her inexperience in production and her personality. There was plenty of evidence in the record before the committee to support its determination. Clearly, the reason given was not an after the fact pretext to cover up its own sex discrimination.

B.

We believe the evidence supports some of the district court's conclusions. "Andre was an outsider, a female, one who exceeded all of the . . . [supervisory personnel] by the level of her education and the breadth of her experience," 584 F. Supp. at 1505, that she "was faced with widespread animosity and suspicion from the day she arrived at Bendix," *id.*, and "that part of Franz's . . . dislike of Jane Andre stemmed from the fact that she could respond to [his] criticisms," 584 F. Supp. at 1506. We can agree that the record supports a finding of hostility between Franz and Andre, but this is only a finding of hostility. An "unfortunate and destructive conflict of personalities does not establish sexual discrimination." *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 182 (3d Cir. 1985) (Wisdom, J.).

The district court found that this hostility was due to Andre's sex and not due to her aggressive managerial style, relative overeducation and high salary, or that she and Franz were competitors for the proposed managerial position.[7] The district court did not specify any reasons in support of its choice. We believe the evidence points toward the latter factors as the more likely grounds for Franz's hostility. We have reviewed the record to determine if there is some basis for supporting the trial court's finding that this hostility was due to Andre's sex, but have been unable to locate any such support.

Franz himself testified that he believed that Andre was being challenged by the hourly workers more because she was a new female supervisor than she would have been if she were a new male supervisor. Tr. 175-76. Franz's memos seem always to side with the hourly worker and criticize Andre's handling of the challenge. *See esp.* Pl. Ex. 4. Further, Franz testified that in his "opinion a hard-line female in the working environment is much less apt to be accepted in the same counterpart as a male." Tr. 195. By "hard-line" Franz meant someone who adopted a "tough, profane, aggressive, direct authoritarian management style." Tr. 194. Franz himself admitted to adopting this style at times, and it seems clear from the record that Andre did as well.

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[7] Indeed, in her rebuttal memorandum Andre appears to attribute Franz's hostility to a fear that she might take his job. She wrote:

> But it appears by now that all [Franz is] interested in doing is building a case against me in the interest of finding some excuse to discharge me to take me out of the superintendent's position and to discredit me so that the company would have reason not to fulfill their promise to move me into the manufacturing manager's position, which was given to him.

Pl. Ex. 15, p. 1.

There was also testimony that there was animosity in the shop against Andre from the day she started, Tr. 226, though the testifying witness attributed this animosity to the fact that "everyone thought she was sent down here from the corporate office . . . to take a job in the shop and find out just what was going on here," Tr. 215, and to her high salary, Tr. 216. The witness, Zack Teeter, stated that he had at one time told Andre that he didn't think she would last six months, but that he had subsequently changed his opinion and decided she was trying hard. Tr. 225-26.

Although there is no allegation that the discharge was retaliatory, we note that there was testimony that Andre hosted a small dinner meeting for other female Bendix employees to discuss the problems of working in a male-dominated field. Andre stated her beliefs and handed out a list of attorneys and agencies that specialized in sex discrimination suits. Not all the women in attendance agreed with Andre that the problems she described were due to sex discrimination and not due to her handling of the incidents described. Tr. 337-39. There is no indication Franz or Moore even knew about this meeting.

The reason given by the review committee was "inabilities to perform the duties of your position." This broke down into both technical and personality-based inabilities. The technical inability is somewhat undercut by the production figures for Department 125. The production figures for Department 125, both in terms of output and in terms of increased productivity measured as reduction in "L.E.D." (losses, errors and defects) was good, and indeed perhaps better than either before or after her tenure when others were supervising. *See* 584 F. Supp. at 1490 & n.7; Def. Ex. A. Moore's suggestion that she go slow on production so as to ease work for the production workers does not sound very convincing. However, although there was testimony she was inquisitive and improving some procedures, there was also testimony that Andre was sometimes obstinate and frequently did not know what she was talking about.

In regard to the personality-based inabilities, we note that Moore had expressed doubts about her abilities to supervise, starting with his initial interview memo and continuing throughout Andre's employment. He had the company send Andre for "sensitivity training" in May 1979, to remedy this perceived inability to get along with her colleagues, subordinates and workers. We have no doubt that Moore was sincere, but some of his information came from his subordinate, Franz, who was Andre's direct supervisor. So we are once again back to the conflict between Franz and Andre. This conflict is evidenced in his memoranda to her file and her rebuttal memorandum. There is nothing to indicate this conflict was due to Andre's sex. Given Moore's longstanding doubts about Andre's capabilities, we believe the district court's finding that the review committee's termination was pretextual is clearly erroneous.

The district court believed Andre, and we are loath to find that credibility determination erroneous. Further, there can be little doubt that there was some sort of hostility or animosity between Franz and Andre, or at least that he had such toward her. But even given Andre's version of the incidents in question, and the objective evidence of the productivity of Department 125 under Andre's supervision, and even if we treat the action of the review committee in affirming the termination as pretextual, we still are unable to locate any evidence that could support a finding of sex discrimination. Apparently the district court had some sort of "hunch" that the hostility shown to Andre was based on her sex. Yet the district court did not articulate any basis for this "hunch," and we are unable to affirm the ultimate finding on the basis of the evidence upon which the district court did rely.

IV.

Bendix's second argument is that it is entitled to a new trial because the district court violated the require-

ments of Rule 52(a) of the Federal Rules of Civil Procedure by adopting wholesale Andre's post-trial brief as its findings of fact and conclusions of law. We agree with Bendix's conclusion, though not precisely for the reason it gives.

This circuit has no rule prohibiting a district court from adopting findings substantially or entirely as proposed by one party. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 263 (7th Cir. 1981) (collecting cases), *cert. denied*, 455 U.S. 921 (1982); *Norfolk & Western Ry. Co. v. B.I. Holser & Co.*, 629 F.2d 486, 489 (7th Cir. 1980). Adoption of a party's proposed findings is left to the sound discretion of the trial court and is reviewed for abuse of discretion. *Lektro-Vend Corp.*, 660 F.2d at 263; *Sheller-Globe Corp. v. Milsco Manufacturing Co.*, 636 F.2d 177, 178 (7th Cir. 1980). However, this court has recognized that where a district court adopts a party's proposed findings of fact wholesale or verbatim, the resulting findings are "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see Norfolk & Western Ry. Co. v. B.I. Holser & Co.*, 629 F.2d at 489. Thus, when a district court adopts a party's proposed findings of fact, "we examine the findings especially critically when deciding whether they are clearly erroneous." *Coates v. Johnson & Johnson*, 756 F.2d 524, 533 n.7 (7th Cir. 1985); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 731 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). Further, we have criticized district courts for adopting verbatim the proposed findings of a party. *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 660 F.2d 1217, 1220 (7th Cir. 1981). *See, e.g., Machlett Laboratories, Inc. v. Techny Industries, Inc.*, 665 F.2d 795, 797 & n.4 (7th Cir. 1981); *Scheller-Globe Corp. v. Milsco Manufacturing Co.*, 636 F.2d at 178; *FS Services, Inc. v. Custom Farm Services, Inc.*, 471 F.2d 671, 676 (7th Cir. 1972). Despite this criticism, the district court below has engaged in the practice. *Norfolk & Western Ry. Co. v. B.I. Holser & Co.*, 629 F.2d at 489; *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 979-80 (7th Cir.

1980), *cert. denied*, 449 U.S. 1096 (1981). We have vacated district court actions when the adopted findings were inadequate to support the court's action. *Machlett Laboratories, Inc. v. Techny Industries, Inc.*, 665 F.2d at 796-98.

The district court here adopted verbatim approximately 54 out of 55 pages of Andre's post-trial brief as its findings of fact. This includes footnotes, citations and spelling and typographical errors. One particularly noteworthy (and, we suspect, embarrassing) result of this wholesale adoption is that the district court cites throughout its analysis to numbered "Facts" which are not contained in its decision. *See* 584 F. Supp. at 1505-07. Andre had used that term in her post-trial brief to refer to her separate "Proposed Findings and Conclusions," App. 121-28, which the district court did not adopt. The court neglected to take the trouble to key its analysis to Andre's post-trial brief statement of facts which it had adopted (in lettered sections) as its findings of fact.

On the other hand, Andre has pointed out some 94 places where the district court made changes in her post-trial brief before it adopted that as its findings and conclusions. *See* Supp. App. 42-45. These changes range from corrections of typographical errors to addition or deletion of whole paragraphs. The vast majority of the changes are deletions ranging from a few words to a few sentences. Given this large number of editorial alterations, we are at least certain that the district court read the post-trial brief before adopting it. *Cf. Machlett Laboratories, Inc. v. Techny Industries, Inc.*, 665 F.2d at 797 & n.4 (vacating preliminary injunction where district court did not read proposed findings of fact it entered as its own). Our concern, therefore, is not so much with the *manner* in which the district court adopted the proposed findings, as with the *adequacy* of the findings which resulted from this adoption.

One of the more important purposes of the Rule 52(a) requirement that a district court make findings of fact is to "aid review by affording a clear understanding of the

ground or basis of the decision." *Wattleton v. International Brotherhood of Boiler Makers, Local No. 1509*, 686 F.2d 586, 591 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983). Indeed, this circuit has held that

> substantial compliance with the fact-finding requirements of Rule 52(a) necessitates that the findings of fact on the merits include as many of the subsidiary facts as are necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.

Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43, 45 (7th Cir. 1976) (per curiam). *See Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 370 (7th Cir. 1984); *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1183-84 (7th Cir. 1982). Once a Title VII trial has progressed to the ultimate issue—whose explanation of motive to believe—"the only subsidiary finding necessary [under Rule 52(a)] is what facts persuade the court to prefer one party's version." *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 136 (7th Cir. 1985).

Clearly, the district court found sex discrimination because, ultimately, it believed Andre and did not believe Franz. But "the trial judge may [not] insulate his findings from review by denominating them credibility determinations." *Anderson v. City of Bessemer City*, 470 U.S. at ____, 105 S. Ct. at 1512. We reveiwed the evidence and the findings predicated on them in Part III and were unable to locate any rational or articulated reason by which the ultimate finding of sex discrimination could be supported. Although the court correctly stated the law it was applying, we were not able to follow the district court's reasoning. Because "[t]he district court . . . made the necessary ultimate finding that there was . . . discrimination, but it failed to make the subsidiary findings necessary for us to follow its chain of reasoning," *Mozee v. Jeffboat, Inc.*, 746 F.2d at 370, this case is much like *Mozee v. Jeffboat, Inc.*, where we remanded for a new trial, even

though the district court here did not ignore whole categories of evidence.

Where the district court's findings are inadequate for meaningful appellate review because we are unable to follow its reasoning, we have sometimes simply remanded to the same judge for further findings (or proceedings if necessary), *e.g., Denofre v. Transportation Insurance Rating Bureau*, 532 F.2d at 45, but more recently and more frequently we have remanded for a new trial before a different judge, *e.g., Rucker v. Higher Education Aids Board*, 669 F.2d at 1184 (trial ended more than one year prior to appeal so record might be stale in trial judge's mind); *Mozee v. Jeffboat, Inc.*, 746 F.2d at 370 & n.6 (first trial judge deceased during pendency of appeal). *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2577 (1971) (appellate court may, due to inadequate findings, order a new trial). Because we are unable to follow the district court's chain of reasoning from hostility to sex discrimination and are unable either to affirm the finding of sex discrimination or to determine that the finding of hostility is clearly erroneous, we will remand this case for a new trial.

For the reasons given above, the judgment of the district court is VACATED and the case REMANDED for a new trial. Circuit Rule 18 shall apply. Each party shall bear its own costs.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—10-3-85—450

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

JANE ANDRE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. S82-77
	)	
BENDIX CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I.

This cause came before the court for trial to the court on August 12, 13, and 14, 1986; final arguments were heard on August 21, 1986. The cause was originally tried by Chief Judge Allen Sharp in February, 1984. His judgment for the plaintiff, reported at 584 F. Supp. 1485 (N.D. Ind. 1984), was reversed by the Seventh Circuit

Court of Appeals and the cause was remanded for a new trial. Andre v. Bendix Corp., 774 F.2d 786 (7th Cir. 1985). This memorandum opinion is intended to comply with the requirements of Fed. R. Civ. P. 52(a).

II.

A.

Bendix was among the businesses to which plaintiff Jane Andre sent her resume in early 1978. That resume reflected a degree in welding, an advanced degree in electrical engineering, and an MBA.[1] In late May or early June, her resume was routed to Frank Cousins, who was responsible for recruiting and was located at Bendix's Southfield, Michigan

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[1] Page three of Plaintiff's Exhibit 1 and Defendant's Exhibit G.

Headquarters; Mr. Cousins appended a note, "Any interest in a senior level female?"[2] and forwarded the resume to A. E. Clark, Vice President and Group Executive of the Aerospace Group. Mr. Clark called Ted Moore, then director of operations of the Energy Controls Division,[3] and read to Mr. Moore from the resume. Mr. Moore said, I'd like to meet that man"; Mr. Clark then said, "Aha, I trapped you," and told Mr. Moore that Ms. Andre was not a man. Bendix

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[2] Page one of Plaintiff's Exhibit 1 and Defendant's Exhibit G.

[3] The Energy Controls Division was one of seventeen divisions of Bendix's Aerospace Group. The Energy Controls Division had 1,500 employees in South Bend, about half of whom were salaried. The Energy Controls Division has annual sales in excess of $2,000,000,000.

was a predominately male company, especially in the manufacturing area. The Energy Controls Division had an established affirmative action plan; Mr. Moore felt that in light of that plan and Ms. Andre's resume, Bendix should interview her. Ms. Andre was invited to South Bend for interviews with Bendix personnel.

Mr. Moore was among those who interviewed Ms. Andre; the interviewed lasted one to two hours. They spoke of why she had left her previous employer, and how she justified her asking salary of $40,000.00. Mr. Moore recommended that Ms. Andre be hired. Mr. Moore's memorandum of the interview[4] noted

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[4] Plaintiff's Exhibit 2; Defendant's Exhibit H.

that she had "unique educational qualifications"; that all her prior experience had been in staff, rather than supervisory, capacities; that she displayed "moderate defensiveness" about some of her past experiences, in which she believed her recommendations had been rejected because of her sex rather than on their own merit; and that some "risk is involved [in placing her in a manufacturing supervisory capacity], in my opinion, because there is no evidence on the record that Mrs. Andre possesses the necessary emotional stability to work in a direct supervisory capacity . . ." Mr. Moore explained at trial that his comment on "emotional stability" reflected Ms. Andre's lack of any experience in responsibility for a large

number of persons.

Ms. Jean Rideout was involved in the decision to hire Ms. Andre. Although she favored the decision, Ms. Rideout had some reservations based on Ms. Andre's frequent job changes, references she had made concerning difficulty with men, and Ms. Rideout's opinion that Ms. Andre was a "very pushy lady".

On July 26, 1978, Ms. Rideout verbally offered Ms. Andre a position with Bendix. A written job offer[5] was extended on August 4, 1978; that job offer was unusual in that it discussed a

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[5] Plaintiff's Exhibit 5 (Defendant's Exhibit I), a letter written by personnel administrator R.L. Morrison, who worked under Jean Rideout's direction.

"logical progression" to the next salary grade range. That discussion was included to interest Ms. Andre in accepting Bendix's offer. She understood that she would be placed in a supervisor's position for training for four to six months, and then would be moved into a manufacturing manager's position. Ms. Andre accepted the offer.

B.

Bendix was not Ms. Andre's first employer. She had earned her engineering degrees in 1959 and 1961. She then worked for two years with Hughes Aircraft Company (1961-63); two years with the Boeing Company (1963-65); sixteen months with Radiation, Inc. (1965-66); twenty-seven months with Bell Aerospace Company (1966-69); three

months with Martin-Marietta Corp. (1969); four months with General Dynamics Corp. (1969); three months with New York Life Insurance Company (1969-70); eleven months with Engineering Centre (1970); fifteen months with Republic Heater Company (1970-72); five months self-employed as Andre's Consulting Service (1972); thirteen months with Forest E. Olson, Inc. (1972-73); thirteen months with Ameron, Inc. (1973-74); six months with Southern California Edison Company (1974-75); and thirty-three months with E G & G Idaho, Inc. (1975-78). Bendix was her fifteenth job in seventeen years. None of her fourteen previous jobs were in line management. She had left her Idaho employer without another

job because she thought it unfair to take three days at a time off to interview for jobs.

C.

Ms. Andre was hired in as general supervisor of Department 125. She had supervisory responsibility over seventy hourly employees and four salaried employees. She was hired in at a salary level higher than that of her male peers: Ms. Andre was hired in at a monthly salary of $2,920.00; the next highest paid supervisor then earned a monthly salary of $2,200.00. Dale Franz, manager of manufacturing and the person to whom Ms. Andre reported, then earned $3,000.00 per month. Functionally, Ms. Andre was a general supervisor, but her salary grade was

that of a superintendent.[6] All other general supervisors in the energy controls division were male.[7] It was anticipated that Ms. Andre would not long be a supervisor, so the pay

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[6] In his findings following the first trial, Judge Sharp found that Bendix "did not treat Jane Andre as a job applicant like any other." Andre v. Bendix Corp., 584 F. Supp. 1485, 1505 (N.D. Ind. 1984). This court agrees: the corporate wooing of Jane Andre was undertaken with considerable though to her sex. The court of appeals held, however, that Bendix's more favorable treatment of Ms. Andre during the application/job offer/hiring relationship "cannot support a finding of sex discrimination. . . Favorable treatment is not actionable under Title VII as sex discrimination." Andre v. Bendix Corp., 774 F. 2d 786, 794 (7th Cir. 1985).

[7] Since October, 1978, general supervisors' pay increased 8.9% per year until 1983, and 4.5% thereafter. Assuming such pay increases, from July, 1979 through October, 1986, Ms. Andre would have earned $339,279.07.

disparity did not concern Ms. Rideout. Nonetheless, according to the testimony of Zack Teeter, none of the supervisors like Ms. Andre's assignment as general supervisor.

1.

Dale Franz was Ms. Andre's immediate supervisor. Mr. Franz had been employed with Bendix since 1948. He had not interviewed Ms. Andre, but was aware of her educational credentials before she started. Bendix's organization was changing when Ms. Andre began work. On October 1, 1978, Mr. Franz took responsibility for all general supervisors on all shifts. Ms. Andre was the only female supervisor reporting to Mr. Franz.

During the first month of Ms.

Andre's employment, Mr. Franz decided that she was a poor listener. Many of their conversations would become argumentative and combative. He also came to doubt her technical expertise in the areas pertinent to Department 125's work.

When Mr. Franz learned of Ms. Andre's salary during the second month of her employment, he was surprised, despite his awareness of her academic credentials. Other supervisors, such as Mr. Tyler and Mr. Strasser, made unhappy comments to Mr. Franz about newer employees making higher salaries; Mr. Franz testified that he told such persons he would not discuss salaries because that was a matter between management and the individual, and he

heard nothing further from those persons.

2.

C. J. "Bud" Tyler had been general supervisor over Department 125 for a bit more than a year before Ms. Andre started with Bendix. When Ms. Andre was hired, Mr. Tyler was told that it would be his job to train her. He found her to be unfamiliar with the processes used in Department 125.[8] After Ms. Andre's orientation period, she would occasionally approach Mr. Tyler with labor problems; he does not feel that Ms. Andre followed his advice.

3.

Jack Loutzenhiser was a first line

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[8] The court believes that Mr. Tyler disliked Ms. Andre, and the court

supervisor assigned to work under Ms. Andre. He has worked at Bendix since 1944. He believed that she attempted to assert her authority too much, came on too strong, and disrupted the department. Ms. Andre's habit of speaking directly to the hourly employees upset Mr. Loutzenhiser, who conceded that it also bothered him when Mr. Franz did so. Mr. Loutzenhiser testified, however, that Mr. Franz stopped talking directly to the hourly employees when Mr. Loutzenhiser asked him to, while Ms. Andre persisted.

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assumes that Mr. Tyler's recollection of the events of 1978 and 1979 is colored by that dislike. Nonetheless, in light of the nature of Ms. Andre's experience before working at Bendix, the court finds it quite plausible that Ms. Andre would have been unfamiliar with the processes used in Department 125.

Indeed, she devised a program under which the hourly employees could be paid for suggestions, which Ms. Andre fielded.

Mr. Loutzenhiser would tell Ms. Andre, who was his superior, to "get out" of the production area; had she not complied, he was prepared to use obscenity. Mr. Loutzenhiser sought a transfer to another department where he could work under a male supervisor. He says he could not work for Ms. Andre. He believed that her presence in the department created "utter chaos".

4.

By contrast, Zack Teeter, whom Mr. Loutzenhiser came to call "Jane's little helper" came to appreciate Ms. Andre and her efforts in her job. At the outset,

he resented her being brought into the department without experience, and he yelled at her the first time she tried to talk to him about certain problems. She followed him to get his views, however, and, despite being reprimanded by Ms. Andre, he came to believe that she improved productivity and could do her job.

D.

On September 27, 1978, union representatives complained about the use of non-bargaining unit personnel to operate a "hot set up" machine. The grievance was submitted to supervisor Paul Luzney, who referred the matter to the superintendent. Mr. Tyler was the department's superintendent on that date; Ms. Andre became superintendent on October

1. Mr. Tyler and Ms. Andre went to Mr. Franz and asked how he wanted them to handle the union's grievance. Mr. Franz told them to forward the grievance to the Industrial Relations Department. Ms. Andre protested that she thought that if she could give the union steward a promise as to the date on which the "set up" machine would be installed in a production area, where union personnel would operate it, the grievance could be settled. Mr. Franz agreed that knowledge of that date would be helpful, but did not change his instructions to take the grievance to the Industrial Relations Department.

Ms. Andre understood Mr. Franz's comments to direct her to see Mr. Spier to determine the date on which the "set

up" machine would be installed in the production area. She did not find Mr. Spier available, however, and did not take the grievance to the Industrial Relations Department. Instead, she held a meeting with the machine's designer and a union representative. She then typed a "management decision" on the grievance record,[9] and began to discuss it with a union representative, who deemed it unsatisfactory. Mr. Franz observed Ms. Andre in that meeting, and called her into his office and directed her to stop her efforts to resolve the dispute, which he believed should be forwarded to Industrial Relations. Ms. Andre referred the grievance to Indus

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[9] Plaintiff's Exhibit 10; Defendant's Exhibit N.

trial Relations, but continued her discussion with the union representatives, who wanted to explain their position to her.

Mr. Franz observed, but did not overhear, this final meeting between Ms. Andre and the union personnel. Mr. Franz was very troubled by Ms. Andre's having attempted to resolve the dispute rather than simply forwarding the grievance to the Industrial Relations Department as he had directed. He wrote a memorandum[10] to Ms. Rideout for Ms. Andre's file. He sent no copy to Ms. Andre.

E.

On October 18, 1978, Ms. Andre met

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[10] Plaintiff's Exhibit 12; Defendant's Exhibit O.

with Mr. Franz and Mr. Moore to discuss her handling of the grievance[11] and also her method of communicating with her subordinates.[12] In attempting to explain and defend her actions, Ms. Andre interrupted Mr. Moore several times, and Mr. Moore lost his temper, raised his voice, and told Ms. Andre to

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[11] In his findings following the first trial, Judge Sharp noted, in support of his finding of sex discrimination, that Mr. Moore "supported Franz's escalation of the incident into a major brouhaha . . ." Andre v. Bendix Corp., 584 F. Supp. 1485, 1505 (N.D. Ind. 1984). The court of appeals, however, held, "We cannot agree that Moore's handling of the dispute could be support for a finding of sex discrimination. There is no evidence union disputes in which male supervisors were involved were evaluated differently by Moore." Andre v. Bendix Corp., 774 F. 2d 786, 797 (7th Cir. 1985).

[12] Mr. Moore testified that Mr. Luzney and Mr. Loutzenhiser had complained to him about Ms. Andre's

"shut up and listen". At the conclusion of Mr. Moore's comments, Ms. Andre again attempted to state her case, and Mr. Moore expressed doubt that Ms. Andre had heard a word he had said.

In another meeting, Mr. Moore counseled Ms. Andre to "soften her approach" and become more conciliatory.

Ms. Andre's dealings with the hourly employees were marked by occasional discord. On as many as three occasions, loud discussion in the production area between Ms. Andre an hourly employees caused work to slow as other hourly employees watched and listened. How

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habit of communicating with them through notes. Those complaints seem ironic in retrospect, given the number of memoranda concerning Ms. Andre that were admitted into evidence in this trial.

ever, from October, 1978 to January 1979, she had no conflicts with the hourly employees.

Mr. Franz met with Ms. Andre in January, 1979 to discuss her department's productivity, which was generally favorable.

In January, 1979, Bendix began looking for employees who wanted to work eight, rather than only four, hours on Saturdays. discussion was had on the production floor about that topic among Ms. Andre, union representative Miltenberger, and hourly employee Larry Graham. The discussion was not a calm one; a union walkout occurred and many of the hourly employees presented themselves as Mr. Franz's office. Mr. Miltenberger and Mr. Graham told Mr.

Franz that Ms. Andre had called Mr. Graham a "fool". Mr. Franz conducted no further investigation of, and did not speak to Ms. Andre about, the incident. He wrote a memorandum to Ms. Rideout to place in Ms. Andre's file, stating, ". . . Ms. Andre blatantly called Mr. Graham a 'fool'. This normally would be considered 'shop talk' but in view of the inflammatory relationship between Ms. Andre and the hourly, I consider this action another example of unacceptable supervision on her part".[13] Mr. Franz testified that he believed that "the inflamatory relationship" may have arisen because the hourly employees, who had never been confronted by a female

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[13] Plaintiff's Exhibit 11; Defendant's Exhibit Q.

supervisor, were "testing" Ms. Andre.

G.

Also in late January, 1979, Cecil Bennett, the second shift foreman of Department 125, discharged hourly employee Bobby Dean for insubordination. Mr. Bennett had spoken with Ms. Andre some days earlier about the problems with Mr. Dean, and Ms. Andre had told him to fire him if necessary. The Industrial Relations Department, however, reviewed the discharge and, against Mr. Bennett's wishes, decided to simply warn Mr. Dean, and reinstated him. Ms. Andre, aware of the discharge, then saw Mr. Dean's name on the production summary. Unaware of the role Industrial Relations played, she assumed that Mr. Bennett "had weakened" and rein

stated Mr. Dean.

Ms. Andre was angry and did not discuss the issue with Mr. Bennett. Instead, on January 27th, she left a note on his desk that inquired of Mr. Bennett, "Do you need a shot of male hormones?"

Mr. Bennett heard about the note from fellow employees before he saw it; people approached him and asked if he had gotten his shot yet. Mr. Bennett had never gotten anything like that note before, and was too upset to seek out Ms. Andre. Instead, he showed the note to Mr. Franz. Mr. Franz did not discuss the issue with Ms. Andre. He simply sent a memorandum to Ms. Rideout for Ms. Andre's file.[14]

H.

On February 5, 1979, Ms. Andre answered the telephone in the supervisor's office. It was a call for an hourly employee named Haynes, from the school Ms. Haynes' child attended. Ms. Andre asked if it was an emergency and learned that it was not, but that the school had no other phone number for Ms. Haynes. Ms. Andre left a note for Mr. Bennett to give Ms. Haynes the following message:

> CALL Mrs. Cole 234-1083 LaSalle H.S. TOMORROW MORNING. PLEASE CONDUCT PERSONAL BUSINESS OUTSIDE OF WORKING HOURS. DON'T LEAVE THE OFFICE PHONE FOR PEOPLE TO CALL YOU BACK. WE ARE NOT STAFFED WITH MESSENGERS HERE.

That note inexplicably worked its way

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[14] Plaintiff's Exhibit 13; Defendant's Exhibit S.

before Mr. Franz, who placed a memorandum about the incident in Ms. Andre's file.[15] Mr. Franz did not discuss the incident with Ms. Andre.[16] The memorandum did not venture an opinion as to the correctness of Ms. Andre's action. Mr. Franz testified that he agreed with the principle upon which Ms. Andre relied, but disagreed with her "inflexibility".[17]

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[15] Plaintiff's Exhibit 14; Defendant's Exhibit T.

[16] Ms. Andre explained at trial that she wrote the note from concern that Ms. Haynes otherwise would miss telephone calls because the office would be vacant during the second shift. In light of the directive to "PLEASE CONDUCT PERSONAL BUSINESS OUTSIDE OF WORKING HOURS", and in light of Ms. Andre's testimony that she did not learn until a few days later of the existence of a telephone number in another department for the second shift, the court cannot believe Ms. Andre's explanation.

I.

On February 12, 1979, hourly employee Bobby Dean appeared with union representation in Mr. Franz's office and explained that he had broken his right hand in a parking lot fall two days earlier. Wrist in cast, Mr. Dean asked for Mr. Franz's permission to work on his second shift job as a vapor blast operator in Department 125. Mr. Franz, who considered the vapor blast job a two-handed operation, denied Mr. Dean permission. Mr. Dean and the union representative made the same request of Mr. Moore, who also denied permission.

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[17] The court of appeals held that Mr. Franz's memo "shows that he questions her action, not that he was discriminating against her because she was a woman." Andre v. Bendix Corp., 774 F.2d 786, 795 (7th Cir. 1985).

Neither Mr. Franz nor Mr. Moore notified Ms. Andre of the Dean request or their rulings on it. Mr. Dean, following what apparently was a Bendix custom, continued to cast about for someone who would let him work; he approached Ms. Andre. Mr. Dean convinced Ms. Andre that there was sufficient vapor blast work that he could do with one hand. She gave him permission to work, and Mr. Dean made arrangements with his supervisor, Mr. Loutzenhiser, as to which jobs Mr. Dean could and could not do. Ms. Andre asked for a doctor's release, and he produced a release from the company doctor, Dr. McMeel.

When Mr. Franz learned that Mr. Dean was working, he contacted Dr. McMeel, who said that Mr. Dean was released only

for a one-handed job, not for a job requiring two hands. The evidence does not disclose whether the note Dr. McMeel gave Mr. Dean was so specific. Mr. Franz prepared another memorandum for Ms. Andre's file,[18] in which he stated his belief that Ms. Andre "used unacceptable poor judgment in allowing Mr. Dean to return to work".[19]

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[18] Plaintiff's Exhibit 15; Defendant's Exhibit U.

[19] The court of appeals held that These incidents may show that Franz refused to treat Andre as a colleague, as the district court found. But Andre was Franz's subordinate. Their respective versions of the incidents show that they differed over what happened and what was appropriate. But nothing shows this difference to be due to Franz discriminating against Andre because of her sex.
Andre v. Bendix Corp., 774 F.2d 786, 796 (7th Cir. 1985).

J.

On March 2, 1979, Ms. Andre met with Mr. Moore, who told her that because of the way her peers and subordinates viewed her, she should change her image to more of a "team player" instead of seeming "obstinate and all-knowing".[20] Mr. Moore told her that she was perceived as opinionated and insensitive, and advised her to seek advice from her peers. Mr. Moore had been told by Mr. Luzney[21] and Mr. Loutzenhiser that Ms. Andre was arrogant and unwilling to listen to others. At another meeting with Ms. Andre, Mr. Moore had told her that human relations goals were more important that numerical

goals. At Mr. Moore's suggestion, Ms. Andre attended sensitivity training; Mr. Moore never suggested that a male supervisor attend sensitivity training.

Mr. Moore engages in a managerial practice now known as "management by walking around", and he would hear comments about Ms. Andre by others in the plant.[22] Mr. Moore conceded that even when one is engaged in "management by walking around", there is a preference that people deal directly with their supervisors, rather than by-passing them. Mr. Moore had no established practice upon receiving a comment about a general supervisor.

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[22] Among those from whom Mr. Moore heard comments about Ms. Andre in this way was Max Swayzee, an hourly employee and a union official.

Whether he would place a memo in a general supervisor's file depended upon the nature and seriousness of the complaint.

On March 12, 1979, Mr. Moore wrote a memo to Ms. Rideout,[23] prefaced with, "The following roughly outlines the 'performance' status of subject employee". The memo detailed the incidents of September 28, 1978 (the grievance incident), October 18, 1978 (the meeting in Moore's office about the grievance incident), the complaints he received about Ms. Andre from Mr. Luzney and Mr. Loutzenhiser, the November 29, 1978 meeting with Ms. Andre and Mr. Franz concerning the willingness to

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[23] Plaintiff's Exhibit 17; Defendant's Exhibit W.

reduce numerical goals in the interest of improved human relations, the March 2, 1979 meeting between Mr. Moore and Ms. Andre. In the concluding paragraph of the four-page memorandum, Mr. Moore stated, "if no modification to her behavior is recognized [following her sensitivity training in early May], then it will be necessary for us to take stronger action with regard to her assignment".

On March 6, 1979, Mr. Franz completed, and sent to Ms. Rideout, a critical appraisal of Ms. Andre.[24] Mr. Franz stated that Ms. Andre was not performing satisfactorily; that she had not demonstrated the relevant technical

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[24] Plaintiff's Exhibit 16; Defendant's Exhibit V.

ability; that she was unable effectively to manage and communicate. He further stated that Ms. Andre's salary was "out of line with her performance and level of responsibility". He described her as "incorrigible" and stated that he did not wish to retain her as a permanent member of his department. Such a periodic appraisal of a new employee customarily is not reviewed with the employee, and neither Mr. Franz nor Ms. Rideout reviewed the appraisal with Ms. Andre.

On March 21, 1979, Mr. Moore called Ms. Andre into his office and presented her with several of the memoranda that he and Mr. Franz had prepared with respect to her performance over the earlier months. After she reviewed

them, Ms. Andre asked if Mr. Moore wanted to hear her side, and he said he did not. Mr. Moore told here that she had the right to file a written rebuttal if she wished, and added that he was prepared to take depositions if she disputed the facts. Ms. Andre understood this last comment to mean that she should not file a written rebuttal.

Instead of submitting a rebuttal for her file, Ms. Andre wrote a memorandum to Mr. Moore[25] in which she expressed regret that "trying to acclimate a female from a predominately development environment to one of production" had been so stressful for Mr. Moore and Mr. Franz. Ms. Andre explained that she was

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[25] Plaintiff's Exhibit 18; Defendant's Exhibit X.

engaging in some critical self-analysis, and offered "a deal with you and Mr. Franz which is the following: If I manage to improve my image in your and Mr. Franz's eyes by my first year's anniversary (or any other date you wish to set), will you be good enough to discard all of those memos you put in my personnel file?"

Mr. Moore responded with a memorandum[26] dated March 30, 1979, in which he declined Ms. Andre's offer of "a deal"; he said the best he could do would be to supplement the file with material reflecting her improvement. He stated that he and Mr. Franz were concerned about Ms. Andre's "ability to

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[26] Plaintiff's Exhibit 19; Defendant's Exhibit Y.

perform as a supervisor both from the technical aspects and the human relations aspects of the job", and stated that they had arranged to send Ms. Andre "to developmental training in the human skills which seem to be lacking".

Ms. Rideout testified that she had received various memos concerning Ms. Andre between October and July, but she did not speak with Ms. Andre about the memos (nor did Ms. Andre contact her) before July 16th. She testified that because the department head has direct responsibility over an employee, her department awaits contact from the department head, the employee or the employee's supervisor before speaking to an employee about such memos.

K.

Ms. Andre had no desk at which to work when she began; indeed, "Bud" Tyler told her not to use the first desk she tried to use, and directed her to sit at a straight chair next to his desk. She used the top of a file cabinet as a desk. Most of her average day was spent outside her office. Ms. Andre did not acquire a desk until late December, 1978. The only desk that became available during that time was assigned to Mr. Ewald, a general supervisor who had been transferred into the energy controls division from another division. Mr. Franz testified that he was aware that Ms. Andre had no desk, but that he was unconcerned about it. Ms. Rideout was unaware until July, 1979

that Ms. Andre felt that she had no desk or chair; had she known, Ms. Rideout testified, she would have addressed the situation, because having a clearly defined work area is important to one's status as a supervisor.

L.

When measured by her "MBO" statistical goals, Ms. Andre's work performance was generally good. Mr. Franz continued to have serious doubts, however, about Ms. Andre's technical abilities, insofar as they were pertinent to Department 125's activities, and Mr. Franz and Mr. Moore were quire dissatisfied with Ms. Andre's performance in the human relations area.

K.

Ms. Andre's responsibility was to

supervise a non-air conditioned shop area. The temperature in some parts of the production area would reach 104 degrees.

No witness other than Ms. Andre testified to having seen other women at Bendix wear tank tops. Even Mr. Teeter, Ms. Andre's best witness other than herself, could remember no garb more revealing than T-shirts. While the court does not doubt the sincerity of Ms. Andre's belief that other Bendix employees wore tank tops, the court does not so find.

1.

On July 12, 1979, Ms. Andre wore to work an elasticized terrycloth top with rope straps. Mr. Franz received a comment from two hourly employees about

Ms. Andre's top. Mr. Franz had never before seen Ms. Andre wear such top, although it had been warm before that.[27] He believed that her garb was less than Bendix expected even of its hourly workers[28]; he believed that Bendix had an unposted "understanding" that one's upper body dress would extend to the shoulders. Mr. Franz called Ms. Andre into his office, told her that her

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[27] Ms. Andre had not worn such a top because her summer clothes had not been sent to South Bend from Idaho before that.

[28] The court of appeals believed that Ms. Andre was being made to dress like a supervisor rather than like an hourly employee. Andre v. Bendix Corp., 774 F.2d 786, 797 (7th Cir. 1986). The evidence presented during this trial, however, supports no such finding. Mr. Franz and Mr. Moore deemed the garb inappropriate for any worker, hourly or salaried.

top was unacceptable, and told her to change. She expressed her belief that the dress code was silent on tops. According to a subsequent memorandum that Ms. Andre prepared later,[29] she responded:

> This is not any different than a tank top which many employees are wearing. What's the difference between two cords over each shoulder and an inch wide fabric strap?
> It's easy for a fellow like yourself sitting in an air-conditioned office to tell people upstairs to put on more clothes. Do you realize that it's already 89 degrees in the office upstairs, that out air-conditioner has only worked for 2 days this year? This is ridiculous! I'm going home and put on a tank top.

Ms. Andre went home. She testified that other employees had worn clothing with similar body coverage, so Mr. Franz must

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[29] Page 18 of Plaintiff's Exhibit 28 and Defendant's Exhibit AE.

have objected because it was made of terrycloth. Accordingly, she changed into a "more traditional" tank top with a rounded neck. Mr. Franz received reports that Ms. Andre returned to work that afternoon wearing the same type of garment.

2.

On July 13, 1979, Ms. Andre reported to work wearing what Mr. Franz considered to be the same type of top, and what Ms. Andre testified to be a tank top similar to the one she had worn the previous afternoon, though "more form-fitting". Again, Mr. Franz called her to his office and told her to go home and change; he told her that her clothing was in bad taste and unsafe. Ms. Andre asked Mr. Franz to put in

writing what dress would be appropriate, but Mr. Franz declined. Ms. Andre stated that she wanted to see the safety officer. Mr. Franz said that was unnecessary, because her clothes were still inappropriate and he would not allow her to wear less than what the hourly employees were required to wear. He did not forbid her to go to the safety engineer. Ms. Andre left the office; Mr. Franz called Mr. Moore and informed him of his problems with Ms. Andre's attire and conduct; Mr. Franz said he was going to approach Ms. Andre about it. In a second call, about noon, according to Mr. Moore, Mr. Franz told Mr. Moore of his intention to discharge Ms. Andre.

After first telling the shop steward

that complaints about attire might lead to a situation in which "the dress for arc welders required by safety codes is a long sleeved shirt buttoned at the wrist, a collar and buttoned to the neck, and this mode of dress might be applied to everyone",[30] Ms. Andre called the safety engineer, Dick Wyatt, who told her on the phone that he thought tank tops were safe and would so inform Mr. Franz. Mr. Wyatt thereafter viewed Ms. Andre's top.[31]

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[30] Page 20 of Plaintiff's Exhibit 28 and Defendant's Exhibit AE.

[31] Mr. Wyatt testified differently. He testified that he felt that Ms. Andre's top was inappropriate for her position and that other employees would jeopardize their health and safety by wearing such a top. Mr. Wyatt further testified that he didn't share that opinion with Ms. Andre, because he wanted to speak with Mr.

3.

After lunch, Mr. Franz saw Ms. Andre wearing the same garb. He again called her to his office. On the way to his office, he stopped at the guard station and asked for the captain of the guard to go to his office as well; Mr. Franz testified that he wanted "an impartial witness" to Ms. Andre's discharge. At his office, Mr. Franz informed Ms. Andre that she was being discharged for insubordination. She refused his first

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Franz first. Mr. Wyatt testified that he told Mr. Franz his opinion, and was told to get back to Ms. Andre.

Because Mr. Wyatt's testimony conflicts with that of Ms. Andre, requiring the court to determine which testimony to credit. Mr. Wyatt appeared to testify evasively, and Mr. Franz did not mention having been contacted by Mr. Wyatt. The court accepts Ms. Andre's version of her meeting and conversations with Mr. Wyatt.

demand for her badge, and Mr. Franz directed the guard to get Ms. Andre's badge and escort her from the plant.[32]

After being escorted from the plant, Ms. Andre showed her co-employee, Nancy Bailey, the top that she had worn; Ms. Bailey said she would not wear something like that.

4.

At some time on July 13th -- whether it was before or after the firing is unknown -- Mr. R. D. Wyatt, health and safety manager, issued a memoran-

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[32] The court of appeals held although the use of the uniformed guard to escort Ms. Andre from the plant "seems bizarre, there is really nothing about it to support an inference that a similarly situated male would have been treated differently." Andre v. Bendix Corp., 774 F.2d 786, 797 (7th Cir. 1985).

dum[33] stating that "Appropriate clothing and footwear must be worn to protect employees from hazards of various manufacturing areas and minimize any employee injuries." The memorandum also served to "re-issue" an earlier memo of June 15, 1979, which provided (omitting the portions relating to exclusively to footwear):

> Effective immediately, employees who are not wearing appropriate footwear or clothing will be required by their supervisor to obtain the proper footwear or clothing before being allowed to work.
>
> * * * * *
>
> In addition, "appropriate clothing" excludes jogging or basketball type shorts. Walking shorts which reach to the knee area are permitted on those jobs which do not require full leg protection.

Neither the June 15th memo nor the July

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[33] Plaintiff's Exhibit 26; Defendant's Exhibit J-2.

13th memo distinguished between hourly or supervisory personnel, or between male and female employees.

5.

On July 13th, after Ms. Andre's termination, Ms. Rideout and Mr. Moore decided to change the termination to a suspension. Ms. Rideout disagreed with Mr. Franz's method of terminating Ms. Andre. Normal procedure would involve discussing the situation with Ms. Rideout prior to termination, but Ms. Rideout considered Ms. Andre's situation to be abnormal due to the overtones of provocation by Ms. Andre. Further, Ms. Rideout was uncomfortable with Mr. Franz's having had Ms. Andre escorted from the building. Ms. Rideout felt that Mr. Franz may have acted "in the

heat of the moment", and that a calmer evaluation was appropriate. A separation committee was called to review the suspension; Mr. Moore could not recall such a committee being called on any occasion in which a man had been discharged. Ms. Rideout could not recall any separation committees being called in other than reduction-in-force situations.

L.

On July 16, 1979, Ms. Rideout and Tom Moon (then manager of human resources) met with Ms. Andre and told her of the decision to change her termination to a suspension. Ms. Andre presented them with her written report[34]

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[34] Plaintiff's Exhibit 28; Defendant's Exhibit AE.

addressing the memoranda in her file and the events of the previous week. Ms. Andre also showed them the garments involved.

Ms. Andre did not appear before the separation committee, which considered Ms. Andre's file and her written report. Nobody appeared before the committee. The separation committee considered reassigning Ms. Andre, but no position came to mind that would not have involved relating to people. The committee decided to terminate Ms. Andre "due to inability to perform the duties of her position".[35] The committee's

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[35] Plaintiff's Exhibit 33; Defendant's Exhibit M.

The court of appeals held, "There was plenty of evidence in the record before the committee to support its determination. Clearly, the reason

decision said nothing about insubordination as a ground for termination; neither did Ms. Rideout's July 20th letter formally informing Ms. Andre of the committee's decision.[36] The committee did, however, consider the July events surrounding Ms. Andre's wardrobe as another indication "of the kind of relationship she had with her employer".

M.

A "management club" exists for salaried management and technical employees at Bendix. Mr. Moore and Mr.

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given was not an after the fact pretext to cover up its own sex discrimination." Andre v. Bendix, 774 F.2d 786, 798 (7th Cir. 1985).

[36] Plaintiff's Exhibit 31; Defendant's Exhibit L.

Loutzenhiser are members of the management club. Ms. Andre would have been eligible for membership. The club had female members in 1978 and 1979, including Ms. Bailey and Ms. Rideout.

N.

Ms. Andre testified that after her discharge, she got a job with an Indianapolis firm called GENADE. She served as director of manufacturing for six months, and earned nearly $20,000.00. GENADE's sales, however, dropped to almost nothing, and she lost her job. Ms. Andre then tried to establish a consulting practice, but never got a client to consult. She testified, with what the court finds to be substantial exaggeration, that she has sent out 7,200 resumes to date for

engineering positions, and has contacted more than 1,000 employment agencies. She has received no job. Bendix has received no inquiry about Ms. Andre from any prospective employer.

She seeks reinstatement.

III.

A.

This court has jurisdiction over this action pursuant to 28 U.S.C. Section 1331, 1343(4); and 42 U.S.C. Section 2000e-5(f)(3).

Section 703(a) of Title VII, 42 U.S.C. Section 2000e-2, provides that "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex or national origin . . ."

In a suit under this section, the plaintiff first must establish, by a preponderance of the evidence, a prima facie case of discrimination; the burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions; should the defendant meet its burden, the plaintiff may prove, again by a preponderance of the evidence, that the defendant's stated reason was a mere pretext for intentional discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

> [A] Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions

Furnco Construction Corp. v. Waters, 438 U.S. 567, 57[illegible] (1978); Taylor v. Philips Industries, Inc., 593 F.2d 783, 785 (7th Cir. 1979).

B.

To make a prima facie showing of discriminatory discharge under the general principles articulated in McDonnell, Douglas, and Burdine, Ms. Andre was required to show (1) that she was a member of a protected class; (2) that she was discharged from her employment; (3) that she was qualified for and was satisfactorily performing the duties of the position from which she was discharged; and (4) that she was replaced by a male or was otherwise

treated disparately. Ms. Andre's qualifications for the job and her satisfactory performance of that job are indispensable elements of a prima facie showing under Title VII. Lee v. National Can Corp., 699 F.2d 932, 936 (7th Cir.), cert. denied, 464 U.S. 845 (1983); accord, Mason v. Continental Illinois National Bank, 704 F.2d 361, 364 (7th Cir. 1983); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

Based on the evidence Ms. Andre presented in her case in chief, the court found that she had established a prima facie case of discriminatory discharge. Bendix then presented evidence of its reason for Ms. Andre's

termination. The case has been tried on its merits; the court should dwell no longer on the matter of the prima facie case, which is no longer relevant to the outcome of the litigation. See, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-715 (1983); Burdine, 450 U.S. at 253; Andre v. Bendix Corp., 774 F.2d 786, 792 (7th Cir. 1985). Because Bendix's proffered reason for the discharge, and the validity of that reason, are essential to the ultimate factual inquiry of whether Bendix intentionally discriminated against Ms. Andre, the court's analysis will proceed within the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), set forth above. The burden of

proof, of course, remains on Ms. Andre. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253.2

C.

The testimony of Mr. Franz and Mr. Moore satisfied Bendix's-burden to produce evidence of a legitimate, nondiscriminatory reason for Ms. Andre's discharge. Mr. Franz' performance appraisal dated March 6, 1979 stated that Ms. Andre was performing unsatisfactorily, that she did not demonstrate relevant technical ability, that she was unable to manage and communicate effectively, and that she was, generally, "incorrigible".[37] Mr. Moore reiterated those opinions in his

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[37] Plaintiff's Exhibit 16; Defendant's Exhibit V.

March 12 memorandum to Ms. Rideout, in which he concluded "if no modification to [Ms. Andre's] behavior is recognized . . . then it will be necessary for us to take stronger action with regard to her assignment".[38] A later memorandum from Mr. Moore, dated March 30, 1979, expressed the shared concerns of Mr. Franz and Mr. Moore about Ms. Andre's "ability to perform as a supervisor both from technical aspects and the human relations aspects of the job".[39]

Mr. Franz's opinion of Ms. Andre's performance had not changed when, on July 13, 1979, he discharged her for

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[38] Plaintiff's Exhibit 17; Defendant's Exhibit W.

[39] Plaintiff's Exhibit 19; Defendant's Exhibit Y.

insubordination due to the incidents of July 12 and 13. The stated reason for Ms. Andre's termination was later modified by the separation committee to show that she was terminated "due to inability to perform the duties of her position".

These unsatisfactory performance critiques began within the first month of Ms. Andre's employment and continued until the time of her termination. While Ms. Andre may have met the statistical production goals for her department, her performance in the area of human relations was, in her employer's eyes, far less than satisfactory.

Based on the evidence presented, the court finds that Bendix has presented a

legitimate, nondiscriminatory reason for terminating Ms. Andre's employment, and has, thereby, fulfilled its burden of production. See Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175, 180 (3rd Cir. 1985) (plaintiff's inability to cooperate with supervisor was legitimate nondiscriminatory reason for discharge, rebutting the presumption of discrimination raised by the prima facie case); Jones v. Los Angeles Community College Dist., 702 F.2d 203, 205 (9th Cir. 1983) (defendant-employer's belief in charges related to unsatisfactory performance, i.e., discourteous treatment of fellow employees, inattention to and dereliction of duty, as a "legally sufficient" explanation for plaintiff's

termination).

D.

Bendix's evidence of a nondiscriminatory reason for its actions sufficiently rebutted the presumption of discrimination created by Ms. Andre's prima facie showing; therefore, the presumption drops from the case. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 255. Nonetheless, the court may still consider evidence presented in the plaintiff's case in chief to establish a prima facie case in deciding whether the defendant's explanation is pretextual. See Burdine, 450 U.S. at 255.

The burden therefore shifted to Ms. Andre to demonstrate by a preponderance of the evidence:

> . . . that the defendant's proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that plaintiff has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256; see also McDonnell Douglas, 411 U.S. at 804-804; U.S. Postal Services Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (Blackmun, J., concurring); Klein v. Trustees of Indiana University, 766 F.2d 275, 282 (7th Cir. 1985). The court must decide, based on direct or circumstantial evidence, which party's explanation of the employer's motivation it believes. United States Postal

Service Board of Governors v. Aikens, 460 U.S. at 716-717.

Ms. Andre challenges the legitimacy of Bendix's stated reasons for her discharge by attempting to show that the incidents which purportedly led to her discharge resulted from sexual bias and prejudice, and that male employees were not subjected to the same treatment under similar circumstances.

The "central focus" in a Title VII disparate treatment case is whether the employee was subjected to different, less favorable treatment. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). No evidence presented at trial indicates that male supervisors involved in similar incidents would have been treated differently. The only

evidence of disparate treatment came from Ms. Andre's testimony regarding her perception of discriminatory treatment during the course of her employment with Bendix. Ms. Andre's perception of the incidents which led to her discharge, without more, cannot suffice to demonstrate that Bendix's decision to terminate her was based on her sex. Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984) ("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis for judicial relief."); Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986) (an employee "must do more than challenge the judgment of his

superiors through his own self-interested assertions").

1.

That Ms. Andre received favorable treatment when she was hired by Bendix because of her sex is undisputed, but such treatment cannot support an action under Title VII for sex discrimination. Andre v. Bendix Corp., 774 F.2d 786, 792 (7th Cir. 1985). Similarly, the absence of a desk for Ms. Andre does not suffice to support a finding of sex discrimination. Id. at 795.

2.

The manner in which Mr. Franz peppered Ms. Andre's personnel file with memoranda cannot alone support a finding of sex discrimination. Id. Mr. Franz plainly disliked Ms. Andre. Nothing in

the record, however, warrants an inference that Mr. Franz would not have prepared the same memoranda for placement in the file of a male supervisor whom he disliked equally. The court might suspect that Mr. Franz would not have disliked a male supervisor as greatly as he disliked the female Jane Andre, but no evidence would support that suspicion.

3.

Ms. Rideout testified that it was customary not to review such performance appraisals with employees until the department head, the employee, or the employee's supervisor requested such a review. While Ms. Andre was unaware of the presence of Mr. Franz's memoranda in her personnel file until March 21, 1979,

Mr. Franz and Mr. Moore both had discussed Ms. Andre's performance with her on earlier occasions. Neither the content nor the frequency of Mr. Franz's memoranda support an inference of sexual bias against Ms. Andre without more.

4.

No evidence supports a conclusion that either Mr. Franz or Mr. Moore exhibited discriminatory intent in the manner in which they criticized Ms. Andre's performance in the union grievance incident of September 28, 1978. Indeed, Mr. Franz's October 9 memorandum of that incident foreshadows Bendix's ultimate stated reason for discharging Ms. Andre: he concluded that Ms. Andre's handling of the union grievance "did not meet a specific

direction from [Mr. Franz] . . . In addition, [Mr. Franz] stated [his] concern with [Ms. Andre's] ability to execute future management directives."[40]

5.

Ms. Andre also points to Mr. Franz's attempted application of a dress code for supervisors, the incident that resulted in her discharge. She maintains that the absence of a written dress code for supervisory personnel at Bendix entitled her to dress in a manner she deemed reasonable despite Mr. Franz's repeated directives to change her attire.

While the dress policy which Mr.

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[40] Plaintiff's Exhibit 12; Defendant's Exhibit O.

Franz sought to enforce may have been unreasonable, given the heat in the department, it was not discriminatory. Andre v. Bendix Corp., 774 F.2d 786, 797 (9185), citing Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175, 181 (3rd Cir. 1985) ("Dress codes . . . are permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women even though the specific requirements may differ.").

Ms. Andre was Mr. Franz' subordinate. Her refusal to comply with Mr. Franz's repeated requests to conform her attire to what he deemed appropriate reasonably could have been considered insubordinate.

6.

The security guard escort from the plant at the time of Ms. Andre's discharge was an extreme measure on Mr. Franz's part, and certainly underscores Mr. Franz's personal dislike of Ms. Andre. The record before the court does not allow the court to find Ms. Andre's sex prompted Mr. Franz to order the escort, or that Mr. Franz would not have treated a male in the same situation and circumstances in a different manner. See Andre v. Bendix Corp., 774 F.2d at 798, quoting Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175, 182 (3rd Cir. 1985) ("unfortunate and destructive conflict of personalities does not establish sexual discrimination").

E.

This is not an easy case. The court cannot say to a certainty that Ms. Andre's sex played no part in her treatment at Bendix's hands. The court of appeals states its belief that in his findings and conclusions following the first trial, Judge Sharp "had some sort of 'hunch' that the hostility shown to Andre was based on her sex. Yet the district court did not articulate any basis for this 'hunch' . . ." Andre v. Bendix Corp., 774 F.2d 786, 799 (7th Cir. 1985). To the extent a "hunch" is a feeling not specifically supported by the evidence, this court shares that "hunch", and believes it to be based upon the palpable evasiveness of Mr. Franz's testimony. During questioning by Ms. Andre's counsel, Mr. Franz seemed

loath to answer any question directly, although during examination by Bendix's counsel, he showed himself to be quite capable of articulate and direct responses. This contrast might have been because Bendix's counsel was not accusing Mr. Franz of sex discrimination, while Ms. Andre's counsel was, or it may have been because Mr. Franz knew that he had treated Ms. Andre as he did because of her sex.

Mr. Franz's demeanor seriously undercut his credibility, and the court has resolved nearly all conflicts between his testimony and Ms. Andre's testimony in Ms. Andre's favor. While Mr. Franz's demeanor would constitute strong corroboration of evidence that Bendix discriminated against Ms. Andre

based on her sex, the record contains precious little evidence of discriminatory intent. Apart from Ms. Andre's personal perceptions of her employer's motivation, there is simply not enough evidence for Mr. Franz's demeanor to corroborate. By contrast, the record contains more than sufficient evidence to support the conclusion that Ms. Andre's failures in the field of personnel management and personal relations, culminating in her refusal to accede to her superior's directives on dress, led to her discharge. A male in similar circumstances might have been treated differently, but the record does not so show.

The burden of proof rests upon Ms. Andre. The evidence does not show, by a

preponderance of the evidence, either that Bendix's stated reasons for Ms. Andre's termination were pretextual or that Bendix's treatment and discharge of Ms. Andre were based on her sex.

IV.

For the foregoing reasons, the court finds for the defendant and against the plaintiff. Judgment shall be entered accordingly.

SO ORDERED.

ENTERED:_____

_____
Robert L. Miller, Jr., Judge
United States District Court

cc: T. Hartzer, C. Addis
L. DiNardo, T. Piskorski
M. Stepanek
Order Book

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

JANE ANDRE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. S82-77
	)	
BENDIX CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This cause comes before the court on plaintiff Jane Andre's motion to amend or alter the judgment entered on November 10, 1986, pursuant to Rule 59 of the Federal Rules of Civil Procedure. The defendant Bendix Corporation has filed its response, and the motion is ripe for ruling.

Briefly stated, Ms. Andre contends

that the court disregarded or failed to consider the cumulative effect of certain evidence that would support a finding that Bendix Corporation's reasons for discharging her were pretextual. Specifically, Ms. Andre contends that the court disregarded or failed to consider the following evidence:

(1) Ms. Andre was escorted out of the plant by a guard while a male employee who was discharged by Dale Franz was not;

(2) Ms. Andre was not assigned a desk for the first several months of her employment;

(3) hourly employees tested Ms. Andre because they had never had a female supervisor before;

(4) Dale Franz unevenly applied the dress code;

(5) a separation committee was formed to review Ms. Andre's discharge while no such committee was ever formed to review the

discharge of any other employee; and

(6) Ted Moore directed Ms. Andre to change her image but never had directed a male employee to do so.

This court's November 10, 1986 memorandum addressed in detail the incidents which Ms. Andre contends were either not considered or were disregarded. The court concluded that the incidents did not support a finding that male supervisors involved in similar incidents would have been treated differently, or that Bendix Corporation's proffered reasons for discharging Ms. Andre were merely pretextual. The court considered the independent and cumulative effects of Ms. Andre's evidence.

In reviewing the record, the court

finds no basis for altering its original order. The record contains more than sufficient evidence to support the conclusion that Ms. Andre's failures in the field of personnel management and personal relations culminating in her refusal to accede to her superiors' directives on dress led to her discharge.

Accordingly, the court finds that the motion to amend or to alter the judgment in this case should be, and hereby is, DENIED.

SO ORDERED.

ENTERED:_____

_____
Robert L. Miller, Jr., Judge
United States District Court

cc: T. Hartzer, J. Hamilton
L. DiNardo, T. Piskorski
M. Stepanek

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1328

JANE ANDRE,

Plaintiff-Appellant,

v.

THE BENDIX CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana.
No. 82 C 77—**Robert L. Miller, Jr.**, *Judge.*

ARGUED SEPTEMBER 22, 1987—DECIDED MARCH 2, 1988

Before WOOD, JR., FLAUM, and EASTERBROOK, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff-Appellant, Jane Andre ("Andre"), appeals from the district court's judgment in favor of Defendant-Appellee, Bendix Corporation ("Bendix") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-(2). The district court held that Andre successfully established a prima facie case of discrimination. The court also held, however, that Bendix proffered a legitimate, non-discriminatory reason for Andre's termination and that Andre failed to show by a preponderance of the evidence that these reasons were pretextual or that Bendix discharged her because of her sex. The district

court therefore held that Bendix did not intentionally discriminate against Andre because of her sex. We conclude that the district court's application of the law was correct and that its findings of fact were not clearly erroneous. We therefore affirm.

I.

A.

This case has a long procedural history. Andre filed suit in 1982 alleging that Bendix discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-(2). Following a two day bench trial, Chief Judge Sharp found that Bendix discriminated against Andre in violation of Title VII, awarded Andre $186,092 in lost wages, and ordered that she be reinstated. *Andre v. Bendix Corp.*, 584 F. Supp. 1485 (N.D. Ind. 1984). Bendix appealed, and this court reversed the district court's judgment because we were "unable to follow the district court's chain of reasoning from hostility to sex discrimination" and were "unable either to affirm the finding of sex discrimination or to determine that the finding of hostility [was] clearly erroneous." *Andre v. Bendix*, 774 F.2d 786, 801 (7th Cir. 1985) ("*Andre I*"). We therefore remanded the case for a new trial.

On remand, a second bench trial was held before Judge Miller. This time the district court held that Andre failed to meet her burden of showing, by a preponderance of the evidence, either that her treatment and discharge were based on her sex or that Bendix's stated non-discriminatory reasons for her discharge were pretextual. As a result, the district court held that Bendix had not intentionally discriminated against Andre in violation of Title VII. Andre appeals the district court's judgment on the grounds that: 1) the district court erred in not finding pretext when it resolved all significant credibility conflicts in favor of Andre; 2) the court's failure to consider the cumulative effect of the evidence and to consider certain

evidence was clearly erroneous; and 3) the district court erred in assuming that the sole basis of Andre's claim was her subjective belief that she was the victim of sexual discrimination.

B.

Only a brief factual examination is necessary because both district court opinions and this court's opinion in *Andre I* set forth an exhaustive review of the facts. *See Andre I*, 774 F.2d at 788-91, 794-99; *Andre v. Bendix Corp.*, No. 82-C-77, slip op. at 1-26 (N.D. Ind. Nov. 10, 1986); *Andre*, 584 F. Supp. at 1486-1502. In August of 1978, Bendix offered Andre a position as a manufacturing superintendent. As a result of Bendix's written offer, which contained an unusual discussion regarding Andre's logical progression within the company, the district court found that Andre understood that she would be in a supervisor's position for four to six months for training and would then be moved into a manufacturing manager's position. Bendix made this unusual offer because Andre had an extensive educational background and Bendix, as part of its affirmative action program, was very interested in hiring a woman of her caliber.[1]

Andre began working for Bendix in September, 1978. Because Bendix's organizational structure was changing, Andre's position was changed to general supervisor, but her salary grade remained that of a superintendent. Andre's

[1] Andre claimed that Bendix's differential treatment of her application helped demonstrate that Bendix continuously treated her differently because of her sex in violation of Title VII. In *Andre I*, however, we held that Bendix's more favorable treatment of Andre during the application/hiring phase could not form the basis of a finding of intentional sex discrimination resulting from her eventual discharge. *Andre I*, 774 F.2d at 794.

immediate supervisor was Dale Franz.[2] Franz had five general supervisors reporting to him, Andre was the only female. Although Franz's initial evaluations of Andre were positive, their working relationship was always tense and quickly deteriorated. During the course of Andre's employment with Bendix, a number of incidents occurred in Andre's department which Franz felt she handled improperly. *See Andre I*, 774 F.2d at 788-91. As a result, Franz frequently filed critical memoranda in Andre's personnel file which he did not show to or discuss with Andre.[3] Franz's supervisor, Mr. Moore, also filed a number of negative evaluations of Andre in her personnel file.

The incident which led to Andre's discharge began on July 12, 1979. Franz thought that Andre's attire on that day was inappropriate for a supervisor and he sent her home to change her clothes. Andre did so and returned to work. Although there is some dispute as to whether female hourly employees often wore tank tops similar to the one Andre wore, Franz objected to Andre's attire not because it was inappropriate for a woman, but because it was inappropriate for a supervisor. The next day Andre came to work wearing the same type of shirt she had worn the day before; Franz also believed that this shirt was inappropriate for a supervisor and in violation of Bendix's dress code. The dress code, however, did not address what type of shirts an employee was permitted to wear; it discussed only pants and shoes. Franz again asked Andre to go home and change. Andre asked Franz to specify what types of shirts she could and could not wear,

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[2] As part of Bendix's reorganization, Franz was laterally transferred to the position of Manager of Manufacturing. In *Andre I* we stated that "[w]e fail to see how the lateral transfer of Franz could support a finding of sex discrimination." *Andre I*, 774 F.2d at 794.

[3] We concluded in *Andre I* that these memoranda could not "raise or corroborate an inference of bias against Andre" because Franz filed similar memoranda in all of his employees' personnel files. *Andre I*, 774 F.2d at 795.

but Franz refused to do so. Instead, Franz argued that her shirt was inappropriate for safety reasons. Andre challenged this assertion and went to see the plant's safety engineer. The safety engineer told Andre that her top did not pose any safety risks and he stated further that he would call Franz and inform him of that conclusion.[4]

Franz saw Andre wearing the same top after lunch. He called Andre into his office and asked the captain of the company's guards to accompany him. Franz testified that he asked the guard to go with him because he wanted an impartial witness to Andre's discharge. Franz told Andre that she was being discharged for insubordination and demanded her badge. Franz then had the guard escort her from the plant.[5]

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[4] At trial, the safety engineer, Dick Wyatt, testified that in his view Andre's shirt was inappropriate for an industrial environment and could pose a safety hazard. Wyatt further testified that he did not tell Andre what he thought about her shirt because he wanted to talk to Franz first. The district court specifically found that Wyatt's testimony was not credible. The court believed Andre and accepted her version of the conversation with Wyatt. We will not overturn a district court's credibility determination unless it is clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The district court's finding is not clearly erroneous and is therefore accepted by this court.

In *Andre I* we determined that the safety reasons Franz proffered might well have been a pretext. We concluded, however, that the safety explanation did not show "that asking Andre to dress appropriately (in this case like a male supervisor) was motivated by sex discrimination." *Andre I*, 774 F.2d at 797.

[5] It is undisputed that Franz had never used a guard to escort any other discharged employee from the plant. In fact, when Franz discharged a male employee who had been caught slashing tires in the parking lot, he did not ask a guard to escort him from the building. In *Andre I*, however, we held that although the use of a uniformed guard "seems bizarre, there is really nothing about it to support an inference that a similarly situated male would have been treated differently." *Andre I*, 774 F.2d at 797.

After Andre's termination, a separation committee was formed to review her discharge. The committee first decided to change Andre's discharge to a suspension pending a review of her record. The committee then decided to terminate Andre, not for insubordination, but "due to [her] inability to perform the duties of her position."[6] Andre was formally notified of the committee's action on July 20, 1978.

On August 14, 1979 Andre filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") and the South Bend Human Rights Commission ("SBHRC"). After a hearing, the SBHRC concluded that there was insufficient evidence to find that Bendix had discriminated against Andre on the basis of her sex. The EEOC gave substantial weight to the SBHRC's findings and held that Andre failed to demonstrate reasonable cause to believe that she had been discriminated against because of her sex. As a result, the EEOC issued a notice of right to sue and Andre filed her complaint in district court.

II.

A.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer ". . . to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000(e)-(2). Andre's claimed discriminatory treatment under Title VII resulted from her allegedly improper discharge. The ultimate factual inquiry in this type of Title

[6] In *Andre I* we held that "[t]here was plenty of evidence in the record before the committee to support its determination. Clearly, the reason given was not an after the fact pretext to cover up its own sex discrimination." *Andre I*, 774 F.2d at 798.

VII case is whether or not the employer treated some employees less favorably than others because of impermissible factors. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

The Supreme Court set forth the allocation of the burdens of proof for a Title VII discriminatory treatment case in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. *Id.* at 802. "A plaintiff alleging a discriminatory firing need show only that [s/he] was fired from a job for which [s/he] was qualified while others not in the protected class were treated more favorably." *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 179 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986). To meet her burden of establishing a prima facie case of discriminatory discharge, Andre must therefore show both that she was qualified for and satisfactorily performing the duties of her job. *Lee v. National Can Corp.*, 699 F.2d 932, 936 (7th Cir.), *cert. denied*, 464 U.S. 845 (1983).

If the plaintiff establishes a prima facie case, an inference of discrimination is raised; we assume that the employer's actions, if unexplained, were more likely than not the result of impermissible factors. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Once the plaintiff proves a prima facie case, the burden shifts to the defendant to demonstrate a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802. If the defendant meets this burden, the plaintiff must then prove by a preponderance of the evidence that the defendant's asserted reason for its actions is in fact pretext. *Id.* at 804. The plaintiff can meet this burden by demonstrating either that the employer's explanation is unworthy of credence or that it is more likely that a discriminatory reason actually accounted for the employer's actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Reeder-Baker v. Lincoln Nat'l Corp.*, No. 87-1287, slip op. at 8 (7th Cir. Dec. 8, 1987); *Benzies v. Illinois Dep't of Mental Health*, 810 F.2d 146,

148 (7th Cir.), *cert. denied*, 107 S. Ct. 3231 (1987). The plaintiff, however, always retains the ultimate burden of persuading the finder of fact that the defendant intentionally discriminated against him or her. *Burdine*, 450 U.S. at 253.

B.

The district court held that Andre met her initial burden of establishing a prima facie case of discriminatory treatment because she proved that she was a member of a protected class, she was qualified for her position and was satisfactorily performing the duties of that position, she was discharged from her job, and was treated disparately. *Andre v. Bendix Corp.*, No. 82-C-77, slip op. at 27 (N.D. Ind. Nov. 10, 1986). The burden of production then shifted to Bendix to put forth a legitimate non-discriminatory explanation for Andre's firing. Bendix's proffered explanation was that Andre was not really performing her job satisfactorily and did not demonstrate the technical ability or the ability to manage and communicate effectively necessary for the successful performance of her duties. The district court held that this explanation satisfied Bendix's burden of production and therefore rebutted the presumption of discrimination created by Andre's prima facie case. *Id.* at 28-29. The initial presumption of discrimination therefore dropped from the case. *Burdine*, 450 U.S. at 255.

The burden then shifted back to Andre to prove either that Bendix's proffered reason for her discharge was pretextual or that it was more likely that a discriminatory reason actually accounted for her termination. This burden merged with Andre's ultimate burden of proving that she was the victim of intentional discrimination. *Id.* at 256.

The district court evaluated all of the evidence and concluded that Andre had not met this final burden. The district court held that none of the evidence presented indicated that a male employee involved in similar incidents would have been treated differently than Andre. *Andre*,

No. 82-C-77, slip op. at 31. The district court therefore concluded that although Andre had established a prima facie case, she did not present enough evidence to corroborate her claim that her sex was the real reason for her discharge. As the district court correctly noted, "Andre's perception of the incidents which led to her discharge, without more, cannot suffice to demonstrate that Bendix's decision to terminate her was based on her sex." *Id. See Elliott v. Group Medical and Surgical Services*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (a subjective belief of discrimination, no matter how genuine, cannot be the sole basis for a finding of discrimination). Because the court properly found that Andre did not present enough evidence to successfully respond to Bendix's proffered non-discriminatory explanation for her discharge, the district court correctly held that Andre failed to meet her burden of demonstrating by a preponderance of the evidence either that Bendix's proffered explanation for her discharge was pretextual or that her treatment and discharge were based on her sex.

III.

The district court's finding that Bendix did not intentionally discriminate against Andre on the basis of her sex is a finding of fact. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). As a result, our review of the district court's decision is limited by Federal Rule of Civil Procedure 52(a) which provides that findings of fact shall not be set aside unless clearly erroneous. A finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Under this standard

> [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier

> of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson, 470 U.S. at 573-74.

There are at least two plausible views of the evidence in this case. In light of our opinion in *Andre I*, we cannot say that the district court's finding that Bendix did not intentionally discriminate against Andre was clearly erroneous. The district court stated that it had a "hunch" that the hostility Andre experienced was based on her sex, but it concluded that there was simply not enough evidence to corroborate that hunch. *Andre v. Bendix Corp.*, No. 82-C-77, slip op. at 35 (N.D. Ind. Nov. 10, 1986); *see also Andre v. Bendix Corp.*, 774 F.2d 786, 799 (7th Cir. 1985). We cannot say that this conclusion was clearly erroneous. We therefore affirm.

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JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 2, 1988

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

JANE ANDRE,
Plaintiff-Appellant,

No. 87-1328 vs.

BENDIX CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 82-C-77
ROBERT L. MILLER, JR., Judge.

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

(2)

No. 88-216

In The
Supreme Court of The United States
October Term, 1988

JANE ANDRE,

Petitioner,

v.

THE BENDIX CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 28.1

On April 1, 1985, The Bendix Corporation was merged into Allied Corporation which is a wholly-owned subsidiary of Allied-Signal Inc.

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No. 88-216

In The
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STATEMENT OF THE CASE

Petitioner Jane Andre ("Andre") recites a lengthy statement of facts which presents the evidence in the light most favorable to her. The operative facts found by the District Court pursuant to Fed. R. Civ. P. 52 are set forth in the District Court's November 12, 1987 Memorandum and Order (Appendix B To Petition). Those findings of fact, not Andre's statement, are controlling for purposes of appellate review and there is no need to repeat them here.

There are, however, several facts raised by Andre which warrant brief responses. First, Andre makes much of the fact that she was escorted out of the plant while a male employee discharged for slashing tires was not escorted (Petition at pp. 19 n. 2, 22). However, Plaintiff fails to present all of the record evidence on this subject. Franz asked the security guard to accompany him to the meeting with Andre to serve as a witness because of Andre's confrontational conduct displayed earlier in the day (Tr. 117, 165, 510). When Franz previously discharged a male for slashing a tire, he likewise had a witness present (Tr. 118). Franz selected the security guard as a witness because he happened to be walking by the guard station on his way to meet with Andre (Tr. 117, 165, 510). After questioning Franz whether other officials had been notified of his decision, and after initially refusing to return her identification badge, Andre left, adding that she would see Franz in court (Tr. 166, 334-35).

The Court of Appeals expressly considered this evidence relating to the escort (Appendix C to Petition at p. 5c n. 5). However, it concluded, for the same reasons expressed in *Andre v. The Bendix Corp.*, 774 F.2d 786 (7th Cir. 1985) (hereinafter referred to as "*Andre I*"), that such evidence did not support an inference of sex discrimination.

Second, Andre asserts that objective measurements of her performance establish that her "'work performance was positive'" (Petition at pp. 10-11). However, it was Andre's deficiencies in interacting with her superiors, peers and subordinates, and not necessarily her technical performance, that resulted in her discharge (Def. Exs. L-M). Moreover, the record evidence also establishes that other objective measurements of her performance reflected unsatisfactory performance (Pl. Ex. 28 at pp. 12B, 43; Tr. 500-03, 533-35, 614-15; Def. Exs. Z, AA, AB, AC, AD).

Third, Andre aserts that "the District Court believed the testimony of [Andre] instead of the testimony of Respondent's

other witnesses" (Petition at p. 18 n. 1). It is true that the District Court credited some of Andre's testimony over some of Respondent's witnesses. However, the District Court also discredited some of Andre's testimony (Appendix B at p. 27b n. 16), and found some of her testimony to be "substantial exaggeration" (Appendix B at p. 54b).

ARGUMENT

I. Reliance On *Andre I* By The Court Of Appeals Was Appropriate.

The crux of Andre's Petition is that the Court of Appeals erred by relying upon facts and evidence from *Andre I*. This argument inaccurately describes the decision of the Court of Appeals.

In *Andre I*, the Court of Appeals stated that "[i]f we were sitting as triers of fact, we would certainly have difficulty finding that Andre had been discriminated against on account of her sex" (Appendix A at p. 2a). Except for certain pieces of new evidence presented by both parties, the record evidence in the second trial was virtually identical to the record evidence in the first trial. Consequently, in *Andre v. The Bendix Corp.*, 841 F.2d 172 (7th Cir. 1988) (hereinafter referred to as "*Andre II*"), the Court of Appeals referred to its reasoning in *Andre I* in concluding that the District Court's finding of no sex discrimination was not clearly erroneous. The Court of Appeals did not rely on evidence from *Andre I* that was not present in *Andre II*, nor did it ignore the new evidence presented at the second trial. Rather, the Court of Appeals logically and reasonably relied on its reasoning and conclusions from *Andre I* where the evidence was identical or nearly identical. There is no legal authority which even remotely suggests that such reliance is in conflict with the law of other circuits or constitutes reversible error of such importance that this Court should grant review.

II. The Court Of Appeals Applied The Proper Standard Of Review.

The District Court, pursuant to its obligations under Fed. R. Civ. P. 52, issued an extensive set of findings of fact and conclusions of law. The Court of Appeals properly applied the clearly erroneous standard set forth in Rule 52 as construed in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The Court of Appeals' decision is fully consistent with the decisions by this Court, the Seventh Circuit and other courts of appeals.

Andre alleges that the decision of the Court of Appeals is inconsistent with two Supreme Court decisions rendered over a century ago. *Insurance Co. v. Dunn*, 86 U.S. 214 (1874) and *United States v. Ayres*, 76 U.S. 608 (1870). Neither case, however, involves an appellate court's standard of review and they have no bearing on this case.

The dispositive facts with respect to the Petition are that the Court of Appeals fully reviewed the findings of fact and conclusions of law issued by the District Court, applied the correct standard of proof for employment discrimination suits set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), applied the correct appellate standard of review as set forth in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and affirmed the District Court's decision based in part on some of the reasons expressed by the Court of Appeals in *Andre I*. The decision of the Court of Appeals is fully consistent with applicable law and presents no issue which warrants review by this Court.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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